TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.10

No. ~~757~~ 415

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 28, 1910.

(21,983)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1910.

1 *Subpœna.*

The President of the United States of America to Park Realty Company, Greeting:

[L. S.]

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of March, A. D. 1910 wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Cedar Street Company and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 26th day of January, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

The Defendant is required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of March, 1910, or the bill will be taken *pro confesso* against it.

J. A. S., *Clerk.*

2 I hereby certify, That on the 26th day of January, 1910, at the City of New York, in my district, I served the within Subpœna in Equity upon the within-named Defendant Park Realty Company by exhibiting to Samuel E. Jacobs, as Treasurer of said Co. at No. 135 B'way, N. Y. City the within original, and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal,
Southern District of New York.

Dated Jan'y 26, 1910.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jan. 26, 1910, John A. Shields, Clerk.

3 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Cedar Street Company, a corporation and citizen of the State of New York, having its principal place of business in the Borough of Manhattan, in the City of New York, and Southern District of New York, brings this its bill, against Park Realty Company, a corporation and citizen of the State of New York, having its principal place of business in the Borough af Manhattan in the City of New York and the Southern District of New York, in its own behalf and on behalf of any and all of the stockholders of the defendant Park Realty Company who may join in the prosecution and contribute to the expense of this suit; and thereupon your orator complains and says:

First. That your orator is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under
4 and by virtue of the Laws of the State of New York, and a citizen thereof, having its principal place of business at No. 11[illegible] Broadway, in the Borough of Manhattan, City of New York and Southern District of New York.

Second. Your orator further shows that the defendant Park Realty Company is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and a citizen of the State of New York, having its principal place of business at No. 135 Broadway in the Borough of Manhattan, City of New York, and Southern District of New York.

Third. Your orator further shows that by the certificate of incorporation and by-laws of the said company the general control of the business and affairs of the said company is entrusted to and conferred upon the directors thereof as a board, acting by the vote of a majority of directors at a meeting thereof.

Fourth. Your orator further shows that your orator is, and at all the times hereinafter mentioned, was duly authorized by its certificate of incorporation to purchase, hold and sell bonds, stocks or investments of any kind, and that your orator is, and at all the times hereinafter mentioned, was a stockholder of record of the defendant Park Realty Company and a holder of 1,000 shares of the preferred capital stock of said Park Realty Company of the par value of $100 each.

Fifth. Your orator further shows that the defendant Park Realty

Company is, and at all the times hereinafter mentioned, was duly authorized by its certificate of incorporation, granted pursuant to the Laws of the State of New York, to purchase or otherwise
5 acquire, hold, own, maintain, work, develop, sell, convey, mortgage or otherwise dispose of real estate and real property and any interest and rights therein; generally to purchase, take on lease or in exchange, hire or otherwise acquire any real and personal property, and any rights or privileges which the company may think necessary or convenient for the purpose of its business; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses or warehouses; to make, enter into, perform and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners and others; to carry on in all their respective branches, the businesses of builders or contractors; to purchase for investment or re-sale, and to sell houses, lands, real property of all kinds, and any interest therein, and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and any other property, whether real or personal, to carry on any or all of the businesses hereinabove specified.

That said Park Realty Company is duly authorized to issue $500,000 of capital stock of which $225,000 or 2,250 shares of the par value of $100 each is preferred stock and $275,000 or 2,750 shares of the par value of $100 each is common stock and said company pursuant to such authority has issued and there is now outstanding $206,000 of preferred stock and $206,000 of common stock. That dividends have been declared and paid upon the said issued preferred stock for the past seven years, and that no dividends have been declared or paid upon said common stock.

Sixth. Your orator further shows that pursuant to the authority granted by its certificate of incorporation as aforesaid, the
6 defendant Park Realty Company has acquired and is the owner of a parcel of real estate, situate, lying and being at the southeast corner of 63d Street and Madison Avenue, in the Borough of Manhattan, City of New York, and Southern District of New York, together with the building erected thereon, and which is known as the Hotel Leonori, which said real property is, and at all the times hereafter mentioned, was leased for a term of twenty-one years to one Charles Leonori at the specified annual rental of $55,000, which said lease expires September 30, 1914. That said real property is subject to a mortgage to the Bowery Savings Bank of the City of New York to secure the repayment of $500,000 with interest at the rate of 4½% per year. That said defendant Park Realty Company is engaged in no other business except the management and leasing of the real property aforesaid, wholly within the State of New York, as aforesaid, and is not engaged in commerce with foreign nations or among the several States or with the Indian tribes, and derives no other or further income except from the rental of its said real property as aforesaid, and has no assets except said

real property, and the income therefrom. That the defendant Park Realty Company is solvent and the net income of said corporation, computed in accordance with the Act of Congress hereinafter mentioned, for the calendar year 1909, is and will be in excess of $5,000 and is and will be at least the sum of $35,000.

Seventh. Your orator further shows that by section 38 of Chapter 6 of the Acts of the First Session of the Sixty-first Congress, which Act became a law August 5, 1909, and which is popularly
7 known as the "Tariff Act", it is provided that every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or of any State or Territory of the United States, or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any State or Territory of the United States, or in Alaska, or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such company, equivalent to one per centum upon the entire net income over and above Five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other companies subject to the tax thereby imposed; or, if organized under the laws of any foreign country, upon the amount of net income over and above Five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other companies, subject to the tax thereby imposed.

It is provided by said Act that such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rental or franchise payments, required to be made as a condition to the continued use or pos-
8 session of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any

State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies, or associations, or insurance companies, subject to the tax thereby imposed.

The provisions of said Act are similar with regard to companies organized under the laws of a foreign country, except that in such case the items of income and expenditure are confined to the business transacted by such companies within the United States, Alaska, or the District of Columbia.

From the net income so computed the further sum of $5,000 is to be deducted and the remainder is the amount upon which the tax is to be computed.

From the provisions of said Act are specifically exempted,
9 labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders, and associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, and any corporation and association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

To the end of arriving at the net income taxed as aforesaid, each of the said companies subject to said tax is required by said Act on or before the first day of March, 1910, and the first day of March in each year thereafter, to make a true and accurate return under the oath or affirmation of its proper officers, to the Commissioner of Internal Revenue of the district in which such corporation has its principal place of business, or, in the case of a corporation organized under the laws of a foreign country, at the place where it does its principal business in the United States, for the calendar year, of the total amount of the paid up capital stock of such company, the total amount of the bonded and other indebtedness of such Company, the gross amount of the income of such Company, the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such Company, the total amount of losses actually sustained by it and the depreciation of its property, the amount of interest paid by it on its bonded or other indebtedness, to an amount of such bonded and other indebtedness not exceeding
the paid up capital stock of such Company, and other matters
10 pertaining to the business and financial condition of such corporation, and the income received by it, which said return is required to be transmitted to the Commissioner of Internal Revenue, who is empowered and required thereupon to assess the tax to which such Company is liable, on or before the first day of June in each successive year, and said tax must be paid by such Company on or before the 30th day of June in said year.

When such assessment is made, the aforesaid return is to be

filed in the office of the Commissioner of Internal Revenue, and constitute a public record open to inspection as such. The failure to make such return as aforesaid is by said Act attended with divers penalties, and if no such return is made, or if the Commissioner of Internal Revenue, in his own judgment, has ground to believe that such return is incorrect then such Commissioner is authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such Company, and to require the attendance of any officer or employee of such Company, and to take his testimony with reference to the matters required to be included in such return, with power to administer oaths, and to require the production of books and papers, and jurisdiction is conferred upon the Circuit and District Courts of the United States to compel such attendance before such Commissioner and the production of such books and papers.

Your orator avers that the defendant Park Realty Company comes within the terms and purview of said act and by the provisions of said act it is sought to require said company to make such returns and to impose such taxes upon said company.

11 Eighth. Your orator further shows that the said defendant Company and its directors controlling its affairs intend voluntarily in the future from year to year to comply with the said provisions with respect to making returns of net income and paying taxes imposed upon the carrying on or doing business by such corporation contained in said Act of the Congress of the United States, and that the said defendant is about to made a return of and with respect to the net income of said corporation for the year 1909, pursuant to said Act and to pay such tax upon the said net income as may be imposed upon such corporation by the Commissioner of Internal Revenue in accordance with said Act, and that the said defendant will from time to time thereafter, make further returns and pay further taxes in pursuance of said Section 38 of said Act, and your orator is informed and believes that if this Court shall not grant to your orator the relief hereinafter prayed, the defendant will make such a return on or before the 1st day of March, 1910, and will on or before the 30th day of June, 1910, pay such tax as may be imposed for the year commencing January 1st, 1909, and ending December 31st, 1909, in accordance with said Act, and will, in ensuing years, make such returns and pay such taxes as the provisions of said Act purport to require.

Ninth. Your orator further shows that the aforesaid provisions relating to a tax with respect to the carrying on or doing business by corporations, joint stock companies or associations and insurance companies, in said Act contained, are repugnant to the Constitution of the United States and that any tax which may be imposed thereunder upon the defendant, Park Realty Company, and ulti-

12 mately upon your orator as a shareholder therein, is and will be unconstitutional and void, for the reasons and in the respects hereinafter stated, to wit:

(*a*) That such provisions are repugnant to and in conflict with

the Third Clause of the Second Section of Article I of the Constitution of the United States, in that while such tax purports to be and is designated as "a special excise tax with respect to the carrying on or doing business by such corporation," it is in truth and in fact a tax upon the real and personal property owned by and invested in such corporation and upon the net income of such property, and is a direct tax within the meaning of the aforesaid clause and is not as provided in said clause apportioned among the several States in the manner prescribed in the said clause and in Article XIV of the Amendments to the Constitution, and such provisions are therefore unconstitutional and void.

(b) That the provisions aforesaid are repugnant to and in conflict with the Fourth Clause of the Ninth Section of Article I of the Constitution of the United States, in that the tax thereby imposed, although said tax purports to be "an excise tax with respect to the carrying on or doing business by such corporation," is in truth and in fact a tax upon the real and personal property owned by and invested in such corporation and upon the net income thereof, and is a direct tax within the meaning of such clause and is not laid in proportion to the census or enumeration directed to be taken in the Constitution as in such clause made and provided, and such provisions are therefore unconstitutional and void.

(c) That if the tax imposed by the provisions aforesaid shall be determined to be an indirect tax, or a duty, impost or excise,
13 the said provisions are nevertheless unconstitutional and void and they are repugnant to and in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that such tax is laid only upon corporations, joint stock companies or associations organized for profit and having a capital stock represented by shares and upon insurance companies, and is not laid upon natural persons, co-partnerships, or other associations of natural persons not incorporated and not having a capital stock represented by shares, and that said tax does not effect or create an equality of burden among direct competitors and is, therefore, not uniform throughout the United States. Your orator alleges that there are many and divers natural persons, co-partnerships and other associations of natural persons not incorporated and not having a capital stock represented by shares, throughout the United States and in the neighborhood of and in direct competition with the defendant Park Realty Company, whose net income is greater than five thousand dollars per year, and greater than the income of the defendant, Park Realty Company, and of many other companies taxed, among whom, upon information and belief, are Julia A. Shaw, owning the Grand Union Hotel, situated at Park Avenue, Forty-first to Forty-second Streets; Jacob Rothschild, owning the Majestic Hotel, situated at Central Park West, Seventy-first to Seventy-second Streets; Thomas R. McNell, Emily P. Kolff, Emma L. Smith and Catherine A. Kingsland, Cornelius F. Kingsland and Daniel K. De Beixedon, as trustees, owning Smith & McNell's Hotel, Washington, Vesey and Greenwich Streets; William Rau, owning the Gallatin Hotel, situated at Sixth Avenue and Forty-sixth Street;

the heirs of Cornelia M. Stewart, deceased, owning the Park Ave
Hotel, situated at Park Avenue, Thirty-second to Thirty-t
14 Streets; the heirs of Hugh Smith, deceased, owning the
ray Hill Hotel, situated at Park Avenue, Fortieth to Fo
first Streets; James R. Roosevelt, Henry B. Ely and Douglas
inson, as trustees under the Will of William Astor for the be
of John J. Astor and certain remaindermen, owning the H
Knickerbocker, situated at Broadway, Forty-first to Forty-sec
Streets; United States Trust Company of New York, as trustee u
the Will of Joseph Fisher, deceased, owning the Hotel Norman
Broadway and Thirty-eighth Street; Cornelia M. Palmer, Juliet
Coleman, Catherine L. Steward, Ellen Cushing, Mary F. De Fo
Florence L. Mabee and Douglas W. Mabee, owning the Hotel
bany, situated at Broadway and Forty-first Street, all in said Boro
of Manhattan, City of New York and Southern District of
York. That by the provisions of said Act aforesaid, no tax is
upon any of the above named nor upon any of the competitor
the defendant, Park Realty Company, being natural persons,
partnerships or other associations of natural persons not incorpor
and not having a capital stock represented by shares.

(d) That if the tax imposed by the provisions aforesaid shal
determined to be an indirect tax, or a duty, impost or excise, ne
theless said tax is unconstitutional and void, and repugnant to
in conflict with the First Clause of the Eighth Section of Artic
of the Constitution of the United States, in that such tax is not
posed upon all corporations engaged in business in the United St
but only upon the defendant, Park Realty Company, and such
porations as have a net income over and above five thousand do
per year, and is therefore not uniform throughout the Un
States.

15 *(e)* That if the tax imposed by the aforesaid provis
shall be determined to be an indirect tax, or a duty, im
or excise, that nevertheless the said tax is and will be uncons
tional and void, and said provisions are in conflict with the
Clause of the Eighth Section of Article I of the Constitution of
United States, in that such tax will ultimately fall upon the sh
holders of the corporation and be deducted from the value of s
shares and from the income of said corporation applicable to
dividends thereon, and your orator and shareholders similarly
ated will be compelled to pay the same, whereas shareholders in
porations having a net income of less than five thousand dollars
not be obliged ultimately to pay such tax, although the total amo
invested by them in shares of such corporations and the net inc
derived by them therefrom may be far in excess of the net inc
received by your orator from its shares in the defendant corporat
and the said tax is therefore not uniform throughout the Un
States.

(f) That if such tax shall be determined to be an indirect tax
a duty, impost or excise, that nevertheless such tax is and wil
unconstitutional and void, and the aforesaid provisions are re
nant to and in conflict with the First Clause of the Eighth Sec

of Article I of the Constitution of the United States, in that there is specifically exempted from the imposition of such tax, labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, domestic building and loan associations organized and operated exclusively for the mutual benefit of
16 their members, and corporations and associations organized and operated exclusively for religious, charitable and educational purposes, no part of the net income of which last inures to the benefit of any private stockholder or individual, although the net income of such corporations and organizations thus exempted may well, and often does, exceed the sum of five thousand dollars, and exceed the income of the defendant, Park Realty Company, and other companies taxed, and the said tax is therefore not uniform throughout the United States.

(*g*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax, or a duty, impost or excise, nevertheless said tax is and will be unconstitutional and void, and said provisions are in conflict with the first clause of the eighth section of Article One of the Constitution of the United States, in that it is the accepted public policy of certain of the States constituting the federal union, such as the State of New York, in which your orator is located, to make easy the divisibility and transferability of real estate, and for that purpose to permit and encourage the organization of corporations to hold and do business in real estate; and it is the policy of certain other States in the federal union, such as the State of Massachusetts, as it is also the policy of Congress with regard to the District of Columbia, not to permit the organization of corporations to buy and sell real estate, and the aforesaid tax will fall upon the defendant Park Realty Company, your orator and your orator's shareholders and those holding real estate within the State of New York and like States through corporate organization, and will not have to be paid by persons holding real estate within other States after the manner and policy of such State governments, and a geographical discrimination is thereby effected, and such tax is not uniform throughout the United States.

17 (*h*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax, or a duty, impost or excise, that, nevertheless, the said tax is and will be unconstitutional and void, and said provisions are in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that in providing how said net income may be arrived at from the said gross income of such corporation received from all sources, it is prescribed that there is to be deducted interest actually paid within the year on the bonded or other indebtedness of such corporation to an amount of such bonded and other indebtedness not exceeding the paid up capital stock of such corporation and thereby all interest paid on their bonded or other indebtedness by the defendant and corporations having an indebtedness greater than their paid-

up capital stock is not allowed as a deduction to such corporations as in the case of corporations not having an indebtedness greater than their paid-up capital stock, but only interest on such amount of their bonded or other indebtedness as does not exceed the capital stock of such corporations and as a result the defendant Park Realty Company and corporations being indebted, over and above the amount of their paid-up capital stock are required to pay such tax at a higher rate than such other corporations and said tax is therefore not uniform throughout the United States.

(*i*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax or a duty, impost or excise, that nevertheless, the said tax is and will be unconstitutional and void, and said provisions are in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that while it is provided that corporations generally are to be allowed as a deduction in computing their net income only the interest
18 paid on such of the corporate indebtedness as does not exceed the amount of the paid-up capital stock of such corporations, yet in computing the net income in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits is so allowed to be deducted and the deposits with such bank, banking association or trust company constitute part of the indebtedness of such company and a discrimination is thereby created in favor of banks, banking associations and trust companies and against the defendant and corporations other than banks, banking associations or trust companies and said tax is therefore not uniform throughout the United States.

(*j*) That the aforesaid provisions are unconstitutional and any tax which may be imposed thereunder upon the defendant Park Realty Company is and will be unconstitutional and void in that in providing how such net income may be arrived at from the gross income received by such corporation from all sources it is in said Act prescribed that there is to be deducted interest actually paid within the year on the bonded or other indebtedness of such corporation to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, and the effect of such provision is that companies coming within the terms and purview of said Act are classified into two divisions, to wit: such corporations as have an indebtedness exceeding their paid-up capital stock, and such corporations as do not have an indebtedness exceeding their paid-up capital stock, and that the former are taxed at a higher rate than the latter, and such classification rests upon no real distinction and is unnatural and such provisions are not a legitimate and constitutional exercise of the taxing power of Congress to secure
19 revenue to the United States, but are colorably merely and are designed and would have the effect unconstitutionally to regulate the internal affairs of such corporations and to compel such corporations to reduce their indebtedness or issue more paid-up capital stock, by penalizing indebtedness above the amount of the paid-up capital stock, and such provisions and any tax which may be imposed thereunder, deprive of their property without due process

of law the defendant and other corporations being indebted above their paid-up capital stock in contravention of Article V of the Amendments to the Constitution of the United States, and are otherwise contrary to the provisions, policy and implied limitations of the Constitution of the United States.

(*k*) That the aforesaid provisions are unconstitutional and void because thereby the franchises of the defendant Park Realty Company and those conferred by the laws of the several States upon other companies coming within the terms and purview of said Act, including the franchise to be a corporation, and to do business in a corporate capacity, are subjected to a discriminating tax not imposed upon natural persons or co-partnerships; whereas, your orator shows that such franchises have not merely the character of private property or of personal privileges conferred upon the corporators for their own advantage, but are instrumentalities created by the laws of the several States, to carry out the public policy of such States, respectively, in regard to matters of which they have exclusive jurisdiction, involving among other things the ownership of property, the promotion of industry, the character of the citizenhood and the development of natural resources in said several States. And your orator shows, by way of illustration, that the laws of the State of
20 New York, in regard to the organization of corporations, are designed to encourage and make possible the accumulation of capital for large enterprises, including works of public utility which might not otherwise be undertaken by private capital; to make the ownership of property, and interests therein, and particularly of real property, more readily divisible and transferable, thereby promoting the extension of such ownerships to a larger body of citizens; to secure more competent and efficient management of property, and to facilitate the supervision of such management on the part of those acting in a representative capacity; to promote the utilization of new inventions and discoveries, the pursuit of new industries and the seeking of new markets, by distributing the risk involved in such enterprises and limiting the liability of those engaged therein; to inculcate the habit of co-operation among the citizens and to accustom them to act in an organized capacity; to perpetuate the good will and trade names of manufacturing establishments and commercial houses; to avoid the halting of business, and the locking up of capital by reason of death; to obtain information by means of periodical reports in regard to conditions affecting commerce and industry, and to enlarge the revenues of the State by means of taxes and fees imposed as a condition of granting such franchises.

Your orator charges that such means and instrumentalities, employed by said States in the exercise of their sovereign powers and functions as aforesaid, are exempt from taxation by the Federal Government, and your orator charges that a law whereby the liability of any person or persons to taxation upon his or their net income, or any part thereof, is made to depend upon the possession of a corporate franchise is in effect a tax upon the franchise itself, and upon the relationship existing between the corporators and the State
21 by virtue of such franchise, and is in derogation of the rights of the several States to control their internal affairs by such

means and in accordance with such policies as to them shall seem appropriate, and is contrary to the provisions of the Constitution of the United States and particularly to the provisions of Article X of the Amendments to said Constitution, whereby the powers not thereby delegated to the United States or prohibited to the States, are reserved to the States respectively or to the people.

(*l*) That the aforesaid provisions are unconstitutional and void, in that thereby the bonds and obligations of the several States and of their municipalities and other political divisions, the interest thereon and income therefrom are taxed, and in computing the net income over and above Five thousand dollars received by any company liable to pay the said tax no provision is made for a deduction from the gross amount of the income of said company of the interest and income from such State and municipal bonds and other obligations, as may be held by such companies and are the instrumentalities of the respective State Governments, and the power of the several State Governments to borrow money is thereby taxed by the Federal Government contrary to the provisions and policy of the Constitution of the United States, and the implied limitation upon the taxing power of the Federal Government contained therein, and particularly to the provisions of Article X of the Amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

(*m*) That the aforesaid provisions are unconstitutional,
22 and any tax that is or may be imposed thereunder upon the defendant Park Realty Company is and will be unconstitutional and void, in that said tax purports to be and is designated as "a special tax with respect to the carrying on or doing business by such corporation", and is a tax upon the right, franchise and privilege to be a corporation and to carry on business in a corporate capacity, and the right to authorize the defendant corporation, or any corporation, to carry on or do business within their respective territories, is exclusively vested in the several States, and the right to tax the defendant corporation, or any corporation upon such right or privilege and with respect to carrying on or doing business within their respective territories, is exclusively vested in the several States, and is not conferred by the Constitution upon the United States, and the said provisions are therefore contrary to the provisions, policy and implied limitations of the Constitution of the United States, and particularly repugnant to and in conflict with Article X of the Amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

(*n*) That the aforesaid provisions are unconstitutional and any tax which may be imposed thereunder upon the defendant Park Realty Company will be unconstitutional and void, in that said tax is thereby imposed on all corporations engaged in business in any State or territory of the United States or in Alaska, or in the District of Columbia, and is not limited to such corporations as are engaged

in commerce with foreign nations or among the several States, or with the Indian tribes, and if any right is vested in the Congress to tax corporations with respect to the carrying on or doing business by said corporations, said right rests upon and exists by virtue of the third clause of the eighth section of Article I of the Constitution of the United States, whereby Congress is given power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and Congress is without power to impose a tax upon the defendant Park Realty Company with respect to the carrying on or doing business by such corporation with and not outside of the State of New York.

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(*o*) That the aforesaid provisions are unconstitutional, and any tax which may be imposed thereunder is and will be unconstitutional and void, in that it is provided by the Act of Congress aforesaid that the defendant corporation, and other corporations, joint stock companies or associations and insurance companies coming within the terms and purview of the said Act, shall, on or before the 1st day of March, 1910, and on or before the 1st day of March in each year thereafter, make a true and accurate return, under oath or affirmation of the president, vice-president or other principal officer, and treasurer or assistant treasurer, to the Collector of Internal Revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth the gross income of such corporation, joint stock company or association, or insurance company, the total amount of the ordinary and necessary expenses actually paid out of earnings, the total amount of losses sustained, the amount of interest paid on its bonded or other indebtedness to an amount not exceeding its paid up capital stock, and other facts relating to its financial standing and the conduct of its business, to the end of arriving at the net income of such business; and it is further provided that in case such corporation, joint stock company or association, or insurance company, does not render such return, then the failure to make such return is to be attended with diverspenalties, and if such return is not made or the Commissioner of Internal Revenue has in his own judgment ground to believe said return is incorrect, then the Commissioner of Internal Revenue is authorized by any regularly appointed revenue agent to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or insurance company to be examined concerning the property and business and financial standing of such corporation, joint stock company or association, or insurance company, and to require the production of books and papers upon such examination; and jurisdiction is given to the Circuit and District Courts of the United States to compel such attendance of wit-

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nesses before the Commissioner of Internal Revenue, and the production of such books and papers and the aforesaid returns with such corrections as the Commissioner of Internal Revenue may make thereto, are upon the assessment of the tax to be filed in said Commissioner's office and thereupon become public records open to the inspection of all, and that all the foregoing is and will be
25 greatly injurious to the defendant corporation and to other corporations, joint stock companies or associations, and insurance companies, coming within the terms and purview of this Act, and will disclose the property, business and affairs of the same to their competitors in business, to the great detriment of said companies, and constitutes an unreasonable search of their persons, houses, papers and effects within the meaning of and contrary to Article IV of the Amendments to the Constitution of the United States.

(*p*) That the aforesaid provisions are repugnant to and in conflict with Article V of the Amendments to the Constitution of the United States, in that the effect thereof is to deprive of their property, without due process of law, the defendant corporation, and other corporations coming within the terms and purview of this Act.

(*q*) That the aforesaid provisions constitute one entire and interdependent system of taxation, and inasmuch as said provisions are unconstitutional and void, for the reasons and in respect to the matters hereinbefore stated, the said provisions are in all respects unconstitutional and void, and any tax which may be levied thereunder upon the defendant Park Realty Company is and will be unconstitutional and void, not only to the extent that it is unconstitutional as to the matters hereinbefore set forth, but in each and every respect and as to the whole thereof.

Tenth. Your orator further shows that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and your orator has protested to the defendant and to the directors of said defendant who are not officers of your orator and who constitute a majority of
26 the Board of directors of said corporation, against the compliance by said corporation, and by said Board of Directors, with the provisions of said Act of Congress hereinbefore referred to, and has claimed before said Board of Directors that the said provisions, so far as any tax is imposed thereby upon the defendant Park Realty Company, are unconstitutional, and has requested and demanded of the defendant and its said directors that they do not comply with said provisions, nor voluntarily make any return or statement in obedience thereto nor voluntarily pay any tax provided for therein, and has requested that said company and its directors contest the constitutionality of the said Act and prevent such unconstitutional and improper diversion of the assets of the corporation in the payment of such tax, and apply to a Court of competent jurisdiction to determine the liability of the company under said Act, and take such steps as might be necessary to protect the rights of the company's shareholders, and has submitted such claim and demand to the said defendants in writing in the form of a letter addressed to said defendants, a copy of which is hereto annexed and

marked Exhibit A, and made a part hereof, and your orator begs leave to refer to the same to the same extent and with the same force and effect as if said letter were here set forth in full.

That, nevertheless, said defendant and its said directors have in all respects refused, and do still refuse, to comply with your orator's demands, as aforesaid, and at a regular meeting of the Board of Directors of said corporation, at which the matter of such demand was duly laid before them, said Board of Directors duly passed a resolution refusing in all respects to comply with your orator's de-
mands, for the reason that want of compliance with the pro-
27 visions of said statute would subject the company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the tax sought to be imposed by the said statute, and of clouding the title to the real estate of the company, which said resolution was communicated to your orator in a letter bearing date December 16, 1909, which is made a part hereof, and a copy of which is annexed hereto and marked Exhibit B, and your orator prays leave to refer to said letter to the same extent and with the same force and effect as if said letter were here set forth in full.

Your orator further shows that it has been, and is unable to have the said action by the Board of Directors reviewed and rescinded or modified by the general body of stockholders of said corporation, and to have said stockholders direct the said Board of Directors to comply with your orator's demand, inasmuch as by the certificate of incorporation and by-laws of the company and by the general laws of the State of New York relating to corporations, pursuant to which said company was incorporated, no provision is made for such control by the general body of stockholders over the acts of the Board of Directors, and no power is conferred to remove said Directors during their tenancy of office, and for the further reason that the annual meeting of said corporation will not take place until the second day of March, 1910, and by the Act of Congress hereinbefore referred to, a return pursuant to such Act is required by said Act to be made on or before the first day of March, 1910.

Eleventh. Your orator further shows that the making of the aforesaid returns and payment of the aforesaid taxes will result in a
great diversion and misappropriation of the assets of the
28 defendant corporation, and will unconstitutionally lessen and diminish the equity of the shareholders in said corporation and the interest of your orator in said corporation as a shareholder therein will be greatly and irreparably injured thereby.

Twelfth. Your orator further shows that unless this Court shall grant to your orator the relief hereinafter prayed, the defendant will pay the aforesaid tax for the past and each year in the future, and threupon will be subject in each successive year to numerous suits at law and in equity by the stockholders of said Company, for the loss and damage sustained by them through the payment of such taxes as aforesaid, and said Company will be obliged to submit wholly to such unconstitutional taxes or in each year to bring suit against the officers of the Government of the United States to recover back the taxes paid as aforesaid. That the issues to be determined in

all such suits brought as aforesaid would be substantially identical with those to be passed upon herein and can be determined more speedily and conveniently by the Court in this suit, and the granting of the relief hereinafter prayed will prevent such multiplicity of suits as aforesaid.

Thirteenth. Your orator further shows that the subject matter of the tax aforesaid is the right of franchise of the defendant, derived from the Laws of the State of New York, to be a corporation, and to do business in a corporate or organized capacity; that said right is of substantial pecuniary value, and that the defendant, in pursuance of one of the conditions upon which said right or franchise was granted, pays an annual tax thereon to the State of New York, which is equivalent to the tax paid upon real estate in the City of
29 New York of the value of Twenty-seven thousand five hundred dollars or more, and your orator charges that said right or franchise being conferred upon the defendant for the purpose, among others, of carrying out the public policy of the State of New York, as hereinabove set forth, is exempt from taxation by the United States, and that said right of exemption from taxation by the United States is of the value of more than Two thousand dollars; that the value of all the preferred stock of said Park Realty Company will be diminished to the amount of at least $5,000 if this defendant be permitted to pay to the United States in each year the aforesaid tax; that your orator is the owner of about fifty per cent. of said preferred stock, and will suffer damage through the diminution in value of said stock in the sum of at least $2,500, if the defendants be not perpetually restrained from paying the tax aforesaid; that the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of Two thousand dollars ($2,000.)

Inasmuch, therefore, as your orator has no adequate remedy at law for its aforesaid grievance and can have relief only in equity, your orator files this bill of complaint in behalf of himself and of other shareholders who may come in and join in the prosecution and contribute to the expense of this suit, and prays for equitable relief as follows:

(1) That the provisions relating to making returns of net income and payment of taxes imposed upon the carrying on or doing business by corporations, joint stock companies or associations, and insurance companies, contained in the Act of Congress afore-
30 said, so far as any tax is sought to be imposed thereby upon the defendant, Park Realty Company, may be adjudged unconstitutional and void.

(2) That the defendant may be perpetually restrained from voluntarily making or causing to be made any return or statement pursuant to said provisions, and from voluntarily paying or causing to be paid any tax which may be imposed thereunder.

(3) That pending such final decree as this Honorable Court may see fit to make herein, a temporary injunction may issue restraining the said defendant from voluntarily making or causing to be made any statement or return pursuant to the aforesaid provisions, and

from voluntarily paying or causing to be paid any tax which may be imposed thereunder.

(4) That the above named defendant be required to answer all and singular the matters above stated.

(5) That a writ of subpœna may be granted to your orator to be directed to the defendant Park Realty Company, thereby requiring said defendant personally to appear on a certain day before the Court, then and there full, true, direct and perfect answer to make (but not under oath which is hereby expressly waived) to all and singular the premises and further to perform and abide by such further order, direction or decree thereof as to the Court shall seem meet.

31 (6) That your orator may have such further and other relief as the Court may deem proper and equitable, and your orator will ever pray, etc.

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

JULIEN T. DAVIES,
RICHARD G. BABBAGE,
Of Counsel.

CEDAR STREET COMPANY,
[L. S] By BYRON M. FELLOWS, *Treasurer.*

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Byron M. Fellows, being duly sworn, deposes and says that he is Treasurer of Cedar Street Company, the above named complainant; that he has read the foregoing bill of complaint, and the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this verification is made by deponent and not by the complainant, is that the complainant is a corporation of which deponent is the Treasurer.

The seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by order of the Board of Directors.

32 The sources of deponent's information and grounds of his belief, are correspondence with the defendant, and information derived in the discharge of his duties as an officer of the complainant.

BYRON M. FELLOWS.

Sworn to before me this 26th day of January, 1910.

[L. S.] HAROLD HARPER,
Notary Public, County of New York.

EXHIBIT A.

Cedar Street Company,
111 Broadway, New York.

DECEMBER 7TH, 1909.

To Park Realty Company and to Samuel E. Jacobs, Maximilian Morgenthau and Henry S. Herrman, three of the directors thereof.

SIRS: We are stockholders of record in the Park Realty Company and are informed that the Company intends to voluntarily comply with the requirements of the provisions relating to the tax with respect to the carrying on or doing business by such Company and upon its net income, contained in the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," and particularly in Section 38 thereof, which act became a law August 5th, 1909, and is known as the tariff act. We are further informed that the Company intends to make returns pursuant to and in compliance with such act and to pay such tax as may be assessed upon it in accordance therewith.

We desire to notify you that we claim that the provisions of said Act of Congress in respect to such tax on the carrying on or doing business, and upon the net income of said Company are unconstitutional. As a shareholder in said company, we hereby protest against any action of the Company and its Directors in voluntarily complying with said provisions, and we request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily making any returns or statements in obedience thereto, and from voluntarily paying the tax provided for therein. We further claim that the payment of any such tax would be a waste and misappropriation of the assets of the Company. We further request that said Company and its Directors shall contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act and take such steps as may be necessary to protect the rights of the Company's shareholders.

Very truly yours,

CEDAR STREET COMPANY,
By R. G. BABBAGE, *President.*

34 EXHIBIT B.

Samuel E. Jacobs.
135 Broadway, New York.

DECEMBER 16, 1909.

Cedar Street Company, 111 Broadway, New York City.

GENTLEMEN: In reply to your letter of December 7th, 1909 we beg to state that the same was duly submitted to our Directors at a meeting held December 14th, 1909. The Minutes of that meeting, so far as they relate to your letter, are as follows:

"Minutes of Special Meeting of the Board of Directors of the Park Realty Company, held on December 14th, 1909, at the office of the company, No. 135 Broadway. Present: Messrs. Herrman, Jacobs, Babbage, Morgenthau and Fellows, being the entire Board of Directors. The Minutes of the last meeting were read and on motion approved.

Mr. Babbage presented a letter from the Cedar Street Company in relation to the corporation tax, which letter was read and directed to be spread upon the minutes. The subject matter of the letter was then taken up and discussed. Mr. Herrman then offered the following resolution, which was seconded by Mr. Jacobs.

Whereas Cedar Street Company, a stockholder of record of this company, has made certain claims and demands upon this company and its Directors, in connection with making returns or payment of taxes under Section 38 of the Tariff Bill of 1909, in a communication in writing, dated December 7th, 1909,

35 Resolved that the Board of Directors decline to comply with the requests of Cedar Street Company for the reason that want of compliance with the provisions of the said statute would subject this company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the taxes sought to be imposed by the said statute, and of clouding the title to the real estate of the company.

A vote was then taken: Messrs. Jacobs, Herrman and Morgenthau voted in favor of the resolution and Messrs. Babbage and Fellows against it, whereupon the President declared the same duly carried."

Very truly yours,

PARK REALTY COMPANY,
SAMUEL E. JACOBS,
Treasurer.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

36 *Appearance.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

To the Clerk of said Court:

Please enter my appearance as solicitor for the defendant in the above entitled case.

Dated New York, January 26th, 1910.

JAMES FRANK,
Solicitor for Defendant, 135 Broadway, Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

37 *Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

The Demurrer of the Park Realty Company, Defendant, to the Bill of Complaint of Cedar Street Company, Complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of *demurrage* showeth, that the said complainant has not in and by said bill, made or stated such a cause as doth, or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained and prays to be hence dismissed with its reasonable costs in this behalf sustained.

Dated January 26th, 1910.

JAMES FRANK,
Solicitor for Defendant, 135 Broadway, Borough of Manhattan, N. Y. C.

38 STATE OF NEW YORK,
County of New York, ss:

Maximilian Morgenthau makes solemn oath and says that he is the President of Park Realty Company and that the foregoing demurrer is not interposed for delay.

MAXIMILIAN MORGENTHAU.

Sworn to and subscribed before me this 26th day of January, 1910.

MARIE D. GLASSMACHER,
Notary Public, New York County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JAMES FRANK,
Solicitor for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

39 *Decree.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

This cause came on to be heard at the January Term of this Court, 1910, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed that the demurrer to the bill of complaint be and the same hereby is sustained upon the ground that the said complain't has not in and by the said bill made or stated any such cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against said defendant, and that the said bill of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk.

Dated this 26th day of January, 1910.

LEARNED HAND.
Judge of the Circuit Court of the United States for the Southern District of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

40 *Notice of Appeal.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

The above named complainant, considering *himself* aggrieved by the decree made and entered by the above mentioned Court in the above entitled cause, on the 26th day of January, 1910, wherein and whereby it was ordered, adjudged and decreed that the demurrer to the bill of complaint herein be sustained and this cause be dismissed, does hereby appeal to the United States Supreme Court from said decree; and complainant prays that this *his* appeal may be allowed, and that a transcript of the record and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, January 25th, 1910.

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

(Endorsed:) Due service of the within notice of appeal is hereby admitted. Dated New York, *July* 27, 1910. James Frank, Solicitor for Defendant. U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

41 *Order Allowing Appeal.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

On motion of Messrs. Davies, Stone & Auerbach, solicitors for complainant, it is

Ordered that the appeal to the Supreme Court of the United States from the final decree filed and entered herein on the 26th day of January, 1910, be and the same hereby is allowed; and that a certified transcript of the record and all proceedings herein be forth-

with transmitted to the said United States Supreme Court at Washington, D. C.; and it is further

Ordered that the bond on appeal be fixed at the sum of $250 the same to act as a supersedeas bond and also as a bond in costs and damages on appeal; and that service of all proceedings be had upon the United States Attorney for the Southern District of New York, as well as upon respondent.

Dated, January 26th, 1910.

LEARNED HAND,
Judge of Circuit Court of the United States for the Southern District of New York.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

42 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

Comes now the complainant and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by this Honorable Court on the 26th day of January, 1910, in the above-entitled cause:

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint herein, and holding that the said bill was without equity.

Second. That the Court erred in not decreeing that Section 38 of the Act of Congress, known as Chapter Six of the Acts of the First Session of the Sixty-First Congress, in so far as the same purported to require the defendant to make certain returns and to impose taxes upon said defendant, was unconstitutional and void, and that said section was violative of the third clause of the second section of Article I, the fourth clause of the ninth section of Article I, and the first clause of the eighth section of Article I, of the Constitution of the United States, and of Article IV, V, and X of the Amendments to the Constitution of the United States.

Third. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for.

43 Fourth. That the Court erred in dismissing said bill with costs.

Wherefore, the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such disposi-

tion may be made thereof, as in accordance with law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

DAVIS, STONE & AUERBACH,
Solicitors for Complainant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

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Bond.

Know all men by these presents, that we, Cedar Street Company, as principal, and the National Surety Company, a New York corporation, of No. 115 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Park Realty Company in the full and just sum of Two hundred and fifty ($250.00) dollars, to be paid to the said Park Realty Company, its certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of The United States for the Southern District of New York in a suit depending in said Court, between Cedar Street Company and Park Realty Company a decree was rendered against the said Cedar Street Company and the said Cedar Street Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Park Realty Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Cedar Street Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CEDAR STREET COMPANY,
By R. G. BABBAGE, *President.*

Attest: [SEAL.]

BEN FELLOWS, *Treasurer.*
NATIONAL SURETY COMPANY,

[L. S.] By WM. A. THOMPSON, [SEAL.]
Resident Vice-President. [SEAL.]

Attest:

——— ———, *Res. Assistant Secretary.*

Sealed and delivered in presence of—
HAROLD HARPER.

UNITED STATES OF AMERICA,
City and County of New York,
Southern District of New York, ss:

On this 27th day of January, in the year 1910, before me personally came Richard G. Babbage, to me known, who being by me duly sworn, did depose and say that he resided in the Borough of Manhattan, City, County and State of New York, that he is the President of the Cedar Street Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said Company and that he signed his name thereto by like order.

[L. S.]

HAROLD HARPER,
Notary Public, N. Y. County.

45 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of January one thousand nine hundred and ten before me personally came Wm. A. Thompson, known to me to be the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Cedar Street Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Res. Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of Cedar Street Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Res. Vice-President of said Company, and that he is acquainted with M. W. Gewecke and knows him to be the Res. Asst. Secretary of said Company; and that the signature of said M. W. Gewecke subscribed to said Bond is in the genuine handwriting of said M. W. Gewecke, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million dollars. That —— —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

[SEAL.]

WM. A. THOMPSON.
(Deponent's signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 27th day of January, 1910.

[SEAL.]

ETTA B. GEWECKE,
Notary Public for County of Kings.
(Officer's signature, description and seal.)

Certificate filed in New York, Queens, Richmond, Westchester & Nassau Counties.

46 (Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. L. H., U. S. District Judge. U. S. Circuit Court, Southern District N. Y. Filed Jan. 27, 1910. John A. Shields, Clerk.

47 By the Honorable Learned Hand, One of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To Park Realty Company and James Frank, its Solicitor:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 17th day of February, 1910, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Cedar Street Company is complainant and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against said complainant and appellant in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 26th day of January, in the year of our Lord One Thousand Nine Hundred Ten, and of the Independence of the United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

LEARNED HAND,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

48 [Endorsed:] R. H. U. Circuit Court of the United States for the Southern District of New York, Second Circuit. Cedar Street Company against The Park Realty Company. (Original.) Citation on Appeal. Davies, Stone & Auerbach, Solicitors for Complainant, Mutual Life Building, 34 Nassau Street, New York City. U. S. Circuit Court, Southern District N. Y. Filed Jan. 27, 1910. John A. Shields, Clerk.

Due and timely service of the within citation on appeal is hereby admitted.

Dated New York, Jan. 27, '10.

JAMES FRANK,
Solicitor for Def't.

49 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to forty-eight inclu-ive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled

CEDAR STREET COMPANY, Compl't-Appellant,
against
THE PARK REALTY COMPANY, Defendant-Appellee,

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January, in the year of our Lord One Thousand Nine Hundred and ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Cedar Street Company, Compl't-Appellant, vs. The Park Realty Company, Def't-Appellee. Transcript of Record from the Circuit Court of the United State for the Southern District of New York.

Endorsed on cover: File No. 21,983. S. New York C. C. U. S. Term No. 757. Cedar Street Company, appellant, vs. Park Realty Company. Filed January 28th, 1910. File No. 21,983.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~757~~ 445

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY, MAXIMILIAN MORGENTHAU, HENRY S. HERRMAN, SAMUEL E. JACOBS, BYRON M. FELLOWS, AND RICHARD G. BABBAGE, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN T. DAVIES,
Of Counsel.

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Now comes Cedar Street Company, appellant above-named, by Frederic D. McKenney, its solicitor of record, and showing to this Honorable Court that the suit above-entitled involves issues of great and general public importance, in that said suit arises under and out of the provisions of section 38 of the act of Congress approved August 5, 1909, 36 Stats. L., 11, commonly called the "Federal Corporation Tax Law," and presents in specific and concrete form the question as to the validity of such law under the provisions of the Constitution of the United States of America, moves the court to advance the same for oral argument at an early day.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN E. DAVIES,
Of Counsel.

STATEMENT.

The appellee, Park Realty Company, does not oppose this motion to advance.

Park Realty Company is a corporation under the laws of New York, having its principal place of business in New York city, and having a duly authorized capital stock of $500,000, represented by shares.

It is the owner of certain real estate and premises situated in New York city, known as the "Hotel Leonori," which it has heretofore leased for a term of years to one Charles Leonori for the specified annual rental of $55,000. Said premises are subject to a certain mortgage of $500,000 and are worth in value over and above said mortgage and all lien and incumbrances thereon the sum of $225,000.

Said Park Realty Company is solely engaged in the business of owning, managing and leasing the real estate and premises aforesaid, and is engaged in no other business whatsoever, either within or without the limits of the State of New York, and it neither has nor received any other or further income from any source than from the rental of its said real property as above described.

Your appellant, Cedar Street Company, is also a corporation under the laws of New York, having its principal place of business in New York city, and as duly authorized under its certificate and articles of incorporation it is a stockholder of record in the Park Realty Company, holding 1,000 shares of the preferred capital stock and 750 shares of the common capital stock of said company, each and every of said shares being of the par value of $100 per share.

Park Realty Company and the majority directors and managers thereof, conceiving that said company falls within the descriptive terms and purview of said section 38 of the act of August 5, 1909, aforesaid, have announced their intention to make at the expense of said company a return in the form required by said section of said act and to pay

upon the basis of such return the amount of the tax specified in and by said section, and have declined and refused to accede to the request of your appellant, Cedar Street Company, not to do so, giving as reason for such refusal that not to make such return would subject the company "to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making (such) return * * * and of clouding the title to the real estate of the company."

Asserting the invalidity of said section of the act of August 5, 1909, and also asserting that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars ($2,000), your appellant, Cedar Street Company, brought its bill of complaint in the United States Circuit Court for the Southern District of New York, to enjoin said Park Realty Company and its officers from making such return and paying such taxes, but the demurrer of said defendant, Park Realty Company, appellee here, to said bill of complaint was sustained by the court and the bill of complaint itself was dismissed.

Among other matters of grave importance which arise out of said section 38 and are specified in and by said bill of complaint, it is especially asserted therein that the provisions of said section of the act of Congress in question are in conflict with and repugnant to the provisions of article 1 of the Constitution of the United States, in that it is attempted thereby to impose a direct tax upon the real and personal property of the Park Realty Company and many other realty and hotel companies and corporations similarly situated and upon the net income of such real and personal property without such tax having first been duly apportioned among the several States as required by the Constitution of the United States.

This question, with others of equally grave and general importance, are presented by the transcript of record in this cause, as the statute in question, if valid, requires all corpora-

tions subject to its terms to make verified returns on or before the first day of March, next, as the basis for the ascertainment and collection of the proposed tax, which tax is required to be paid "on or before the thirtieth day of June," next, under heavy penalties for failure so to pay, it is plain that it is to the interest of the United States, as well as of the thousands of corporations throughout the length and breadth of the United States which fall within the purview of the statute, that a final and authoritative determination of the questions raised in and by this suit should be had at an early day.

Wherefore, appellant, Cedar Street Company, respectfully submits that its motion to advance this cause for early hearing should be granted.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN E. DAVIES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

No. ~~757~~ 445

CEDAR STREET COMPANY,
Complainant and Appellant,

vs.

PARK REALTY COMPANY,
Defendant and Appellee.

BRIEF FOR APPELLANT

DAVIES, STONE & AUERBACH,
Solicitors for Appellant.

JULIEN T. DAVIES,
FREDERIC D. McKENNEY,
Of Counsel.

ABSTRACT AND INDEX

The question is whether the Corporation Tax Law passed as part of the Tariff Act of 1909, (Sec. 38, Chapter 6, Acts of the First Session of the 61st Congress) **is Constitutional.**

In the Supreme Court of the United States

On appeal from The Circuit Court of the United States for the Southern District of New York.

CEDAR STREET COMPANY,
Complainant and Appellant,

against

PARK REALTY COMPANY,
Defendant and Appellee.

OCTOBER TERM, 1909.
No. 757.

BRIEF FOR COMPLAINANT AND APPELLANT.

Statement of the Case.

The above entitled appeal is from a decree of the Circuit Court of the United States for the Southern District of New York sustaining a general demurrer to the Bill of Complaint and dismissing the said bill with costs.

This cause is brought directly here upon the ground that the constitutionality of a law of the United States is drawn in question. This law, which appellant maintains is invalid, is contained in Section 38 of an act designated as "An Act to provide revenue, equalize

duties and encourage the industries of the United States and for other purposes" which was approved August 5, 1909 as Chapter 6 of the Acts of the First Session of the Sixty-first Congress (39 Stats. L. 11) and which is generally known as the "Tariff Act".

For the convenience of the Court, a copy of said section 38 is annexed hereto as "Appendix A". The said section will hereafter be referred to as "The Corporation Tax Law".

The suit is by Cedar Street Company, a stockholder of the appellee, to restrain the appellee company from voluntarily making returns pursuant to the Corporation Tax Law, and from voluntarily paying any taxes, purported to be required thereby, upon the ground that the law is unconstitutional and void, and that rendering obedience thereto would effect a diversion and misappropriation of the assets of the defendant company, and would irreparably impair the interests of the complainant as a stockholder thereof and would further result in a multiplicity of suits. (fols. 3-31.)

The only questions discussed in this brief relate to the constitutionality of the various features of the Corporation Tax Law in its application to the parties herein.

The defendant (appellee herein) having demurred, all of the material facts alleged in the bill will be taken as true.

The appellee is a corporation organized under the laws of the State of New York (fol. 4), and is duly authorized in its certificate of incorporation to buy, sell and lease real estate, erect and improve buildings and manage or lease hotels, apartment houses or warehouses and to make and enter into all contracts and exercise all proper and usual powers incidental to its business. It is authorized to issue $500,000 of capital stock, of which $225,000 is preferred and $275,000 is common, and

it has issued and there is now outstanding $206,000 of the preferred stock and $206,000 of common stock. The par value of its shares is $100. (fol. 5.)

The only business operation in which the company has been engaged has been the purchase of a site at the southeast corner of 63rd Street and Madison Avenue, in the Borough of Manhattan, City of New York, and the erection of a building thereon which is operated as a hotel by a lessee under the name "Hotel Leonori". (fol. 6)

This lease, which does not expire until September 30, 1914, is at a specified annual rental of $55,000. The property is subject to a mortgage to the Bowery Savings Bank of the City of New York, to secure the re-payment of $500,000, with interest at 4½%. The Park Realty Company is solely engaged in the business of owning, managing and leasing the real estate and premises aforesaid, and is engaged in no other business whatsoever either within or without the limits of the State of New York, and it neither has received, nor now receives, any income from any source other than the rental of its real property as above described. The net income of the appellee for the year 1909, computed in accordance with the Corporation Tax Law, is at least the sum of $35,000. (fol. 6.)

It is a fact of common knowledge that New York City, in which the hotel property of the appellee is situated, because of the large number of strangers who are there annually entertained, and also because of the large number of residents who have acquired the habit of hotel life, is famed for its many and elegant hostelries, and is the scene of very keen competition in the hotel business.

Many of these valuable properties are owned, and leased or operated by private individuals, co-partnerships and other associations of natural persons not incorporated and not having a capital stock represented

by shares. Among these hotel properties in the hands of private individuals, all of which yield to their owners a larger net income than that of the Park Realty Company may be mentioned: the Grand Union Hotel, the Majestic Hotel, Smith and McNell's Hotel, the Gallatin Hotel, the Park Avenue Hotel, the Murray Hill Hotel, the Hotel Knickerbocker, the Hotel Normandie and the Hotel Albany (fols. 13-14).

The Corporation Tax Law appears to be applicable to the appellee corporation. The full text of the law is set out in "Appendix A," but the important features which will be brought to the attention of the court on the argument are as follows:

(1) Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State, is made subject to pay annually "a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stocks of other corporations."

(2) From the provisions of said law are specifically exempted labor, agricultural, and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, and any corpora-

tion or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

(3) The net income taxed as aforesaid is to be ascertained by deducting from the gross amount of the income of the corporation (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rental or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies, or associations, or insurance companies, subject to the tax hereby imposed.

From the net income so computed the further sum of $5,000 is to be deducted and the remainder

is the amount upon which the tax is to be computed.

(4) To the end of arriving at the net income sought to be taxed, the corporation is required on or before the first day of March, 1910, and the first day of March in each year thereafter, to made a true and accurate return under oath to the Collector of Internal Revenue for the District in which the corporation has its principal place of business, setting forth, (first) the total amount of the paid-up capital stock of such corporation outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation at the close of the year; (third) the gross amount of the income of such corporation received during such year from all sources, also the amount received by such corporation within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation; (seventh) the amount paid by it within the year for taxes imposed under

the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or associations, or insurance company, after making the deductions in this section authorized.

(5) The returns so made are to be transmitted to the Commissioner of Internal Revenue who is to assess the tax which the corporation is liable to pay thereon on or before the first day of June in each successive year, which is required to be paid on or before the 30th day of June.

(6) Whenever a return is not made or the Commissioner of Internal Revenue from evidence produced before him has, in his opinion, ground to believe that the return is incorrect, he may require further information of the corporation and is authorized by any regularly appointed revenue agent, specifically designated by him for that purpose, to examine any books and papers bearing upon the matters to be included in the return of the corporation, and to require the attendance of any officer or employee and to take his testimony, with power to administer oaths, and he may invoke the aid of any Court of the United States, having jurisdiction, to require the attendance of such officers or employees, and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend the return or make a return where none has been made.

(7) When the assessment is made, the returns, together with any corrections thereof, are to be

filed in the office of the Commissioner of Internal Revenue and constitute public records open to inspection as such.

(8) In the case of any return made with false or fraudulent intent, the Commissioner of Internal Revenue is to add one hundred per centum of the tax, and in case of a refusal or neglect to make a return or to verify the same, he is to add fifty per centum of the tax. If any corporation refuses or neglects to make a return or renders a false or fraudulent return, such corporation is made liable to a penalty of not less than $1,000, and not exceeding $10,000.

By the foregoing provisions, the appellee, Park Realty Company, is required to make a return in accordance with the provisions of the Corporation Tax Law on or before the first day of March, 1910, and on or before the first day of March in each year thereafter, and on or before the thirtieth day of June in each year to pay such tax as the Commissioner of Internal Revenue shall assess upon the basis of such returns (fols. 7-10).

The majority of the directors of the appellee concede both the constitutionality of the law and its application to the Park Realty Company (fol. 11 and fols. 26-27).

The appellant is also a New York Corporation, and by its certificate of incorporation is duly authorized to hold the stocks of other companies, and it is a stockholder of record in the appellee, owning one thousand shares of the preferred stock of the par value of $100 each (fol. 4).

The officers of the appellant being convinced of the unconstitutionality of the Corporation Tax Law, for the reasons urged hereafter in this brief, on December 7th, 1909, addressed a letter to the appellee and the directors

who were not officers of the appellant, and who constitute a majority of the Board of Directors of the appellee, as follows: (fol. 26).

CEDAR STREET COMPANY,
111 Broadway,
New York.

December 7th, 1909.

To Park Realty Company and to Samuel E. Jacobs, Maxmilian Morgenthau and Henry S. Herrman, three directors thereof:

Sirs:

We are stockholders of record in the Park Realty Company and are informed that the Company intends to voluntarily comply with the requirements of the provisions relating to the tax with respect to the carrying on or doing business by such Company and upon its net income, contained in the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes", and particularly in Section 38 thereof, which act became a law August 5th, 1909, and is known as the tariff act. We are further informed that the Company intends to make returns pursuant to and in compliance with such act and to pay such tax as may be assessed upon it in accordance therewith.

We desire to notify you that we claim that the provisions of said Act of Congress in respect to such tax on the carrying on or doing business, and upon the net income of said Company are unconstitutional. As a shareholder in said Company, we hereby protest against any action of the Company and its Directors in volun-

tarily complying with said provisions, and we request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily making any returns or statements in obedience thereto, and from voluntarily paying the tax provided for therein. We further claim that the payment of any such tax would be a waste and misappropriation of the assets of the Company. We further request that said Company and its Directors shall contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act and take such steps as may be necessary to protect the rights of the Company's shareholders.

Very truly yours,

CEDAR STREET COMPANY,

By R. G. BABBAGE,

President.

(fols. 32-33)

The intentions of the appellee were made clear in a communication in writing addressed to the appellant as follows (fol. 27):

SAMUEL E. JACOBS,
135 Broadway,
New York.

December 16 1909.

Cedar Street Company,
111 Broadway, New York City.

Gentlemen:

In reply to your letter of December 7th, 1909 we beg to state that the same was duly submitted to our Direc-

tors at a meeting held December 14th, 1909. The Minutes of that meeting, so far as they relate to your letter, are as follows:

"Minutes of Special Meeting of the Board of Directors of the Park Realty Company, held on December 14th, 1909, at the office of the Company, No. 135 Broadway. Present: Messrs. Herrman, Jacobs, Babbage, Morgenthau and Fellows, being the entire Board of Directors. The Minutes of the last meeting were read and on motion approved.

Mr. Babbage presented a letter from the Cedar Street Company in relation to the corporation tax, which letter was read and directed to be spread upon the minutes. The subject matter of the letter was then taken up and discussed. Mr. Herrman then offered the following resolution, which was seconded by Mr. Jacobs.

WHEREAS Cedar Street Company, a stockholder of record of this company, has made certain claims and demands upon this company and its Directors in connection with making returns or payment of taxes under Section 38 of the Tariff Bill of 1909, in a communication in writing, dated December 7th, 1909.

RESOLVED that the Board of Directors decline to comply with the requests of Cedar Street Company for the reason that want of compliance with the provisions of the said statute would subject this company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the taxes sought to be imposed by the said statute, and of clouding the title to the real estate of the company.

A vote was then taken: Messrs. Jacobs, Herrman and Morgenthau voted in favor of the resolution and Messrs.

Babbage and Fellows against it, whereupon the President declared the same duly carried."

Yours very truly,
PARK REALTY COMPANY,
SAMUEL E. JACOBS,
Treasurer.
(fols. 34-35)

The appellant was unable to have this action by the Board of Directors reviewed and rescinded or modified by the general body of stockholders of the Park Realty Company, and to have the stockholders direct the Board of Directors to comply with the Cedar Street Company's demands, inasmuch as, by the certificate of incorporation and by-laws of the appellee Company and by the general laws of the state of New York relating to corporations, pursuant to which the appellee was incorporated, no provision is made for such control of the general body of stockholders over the acts of the Board of Directors, and no power is given to remove said Directors during their tenancy of office, and for the further reason that the annual meeting of said corporation was not to take place until the second day of March 1910, while the Corporation Tax Law purported to require a return to be made on or before the first day of March, 1910 (fol. 27).

In view of the attitude assumed by the appellee and the majority of its Board of Directors, the appellant is powerless to prevent the making of the returns and the payment of the taxes purported to be required by this law which it claims to be unconstitutional, unless relief is granted it by a court of equity.

The court below has sustained a demurrer and dismissed the bill, thereby holding that the said bill was without equity and that the Corporation Tax Law was a valid enactment. (fols. 37-39.)

Specification of Errors.

In order that the question of the constitutionality of the Law may be presented squarely to this Court, the appellant has assigned the following errors with respect to the sustaining of the demurrer and the dismissal of the bill in the Court below.

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint herein, and holding that the said bill was without equity (fol. 42).

Second. That the Court erred in not decreeing that Section 38 of the Act of Congress, known as Chapter Six of the Acts of the First Session of the Sixty-first Congress, in so far as the same purported to require the defendant to make certain returns and to impose taxes upon said defendant, was unconstitutional and void, and that said section was violative of the third clause of the second section of Article I, the fourth clause of the ninth section of ArticleI, and the first clause of the eighth section of Article I, of the Constitution of the United States, and of Articles IV, V. and X of the Amendments to the Constitution of the United States (fol. 42).

Third. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for (fol. 42).

Fourth. That the Court erred in dismissing said bill with costs (fol. 43).

POINT I.

The Tax imposed upon the Appellee by the Provisions of the Corporation Tax Law is a Direct Tax upon Income from Real Estate and Personal Property and not being appor-

tioned among the several States is unconsti tutional.

The provisions of the Constitution of the United State which we conceive to be applicable to this discussion are the third clause of the Second Section of Articl I, and the fourth clause of the Ninth Section of Articl I.

The former so far as material is

> "Representatives and direct taxes shall be ap portioned among the several states which may b included within this Union, according to their respec tive numbers;"

The latter is

> "No capitation or other direct tax shall be laid unless in proportion to the census or enumeratio hereinbefore directed to be taken."

The intent and effect of these two provisions is be lieved to be identical. This court has said:

> "The Constitution ordains affirmatively tha representatives and direct taxes shall be apportione among the several states according to numbers, an negatively that no direct tax shall be laid unless i proportion to the enumeration."
>
> *Pollock v. Farmers Loan & Trust Company,* (re *hearing*) 158 U. S. 601 at p. 621.

The purpose of these provisions has been thus ex plained by this court:

> "Nothing can be clearer than that what the Con stitution intended to guard against was the exercis by the general government of the power of directl taxing persons and property within any stat through a majority made up from the other state It is true that the effect of requiring direct taxes t be apportioned among the States in proportion t

their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject matter to a larger extent in proportion to its populatian than another state has, would be less than in such other state, but this inequality must have been held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers."

Pollock v. F. L. & T. Co., 157 U. S. 429 at p. 582.

A.

The Tax Sought to be Imposed upon the Appellee is not Apportioned.

In the four instances in which an apportioned tax has been imposed, (Acts of July 14, 1798, August 2, 1813, January 19, 1815 and August 5, 1861) the method has been to call for a specified lump sum from the whole country and to assign to each State its quota in proportion to the population of the State. The Corporation Tax Law prescribes a certain rate of taxation for all corporations, joint-stock companies and insurance companies within the several States without regard to the amount which will be contributed from each State, which amount may and in most cases will be all out of proportion to the number of inhabitants.

It follows that if the Corporation Tax Law seeks to impose a *direct tax* upon the Park Realty Company, that it is repugnant to the Constitution. The proposition is thus reduced to this: Does the Corporation Tax Law provide for a *direct tax* upon the appellee?

It will be observed that the corporation is required

to pay a tax "equivalent to one per centum upon the entire *net income* over and above five thousand dollars."

The income of the appellee in this case is derived entirely from the rent of real estate.

B.

A Tax on the Net Income of Real Property is a Direct Tax.

A tax upon land is a direct tax. This principle has been repeatedly avowed by the Supreme Court even in the cases which may be adduced to lend support to the contentions of our opponents.

Hylton v. United States, 3 Dallas 171.
Veazie Bank v. Fenno, 8 Wall 533;
Springer v. United States, 102 U. S. 586.

In deference to this principle, moreover, all of the taxes which the Federal Government has laid upon the land itself, have been laid by the rule of apportionment.

In the *Income Tax Cases* decided by this Court, March 18, 1895, and upon rehearing May 20, 1895, with respect to the general income tax law which was part of the tariff bill of 1894, it was adjudicated that a tax upon the income derived from real estate is indistinguishable from a tax on the real estate itself and is a direct tax and if not apportioned is unconstitutional.

In pronouncing the judgment of this Court upon the first hearing, Mr. Chief Justice Fuller said:

> "We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid."
>
> *Pollock v. Farmers L. & Tr. Co.*, 157 U. S. 429 at p. 583.

In the earlier *Pollock* case, Mr. Justice Fuller in a most exhaustive analysis considered all of the decisions

brought to the attention of the Court at that time with this result:

> "Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land."
>
> Id. 157 U. S. p. 579.

After a thorough reconsideration of the case, Mr. Justice Fuller, in the prevailing opinion, announced the decision of the Court in these words:

> "Our conclusions may, therefore, be summed up as follows:
>
> "First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."
>
> "Second. We are of opinion that taxes on personal property or on the income of personal property are likewise direct taxes."

The court further held that the entire scheme of taxation was invalid because of these unapportioned, unconstitutional taxes.

> *Pollock v. Farmers L. & Tr. Co.* 158 U. S. 601 at p. 637.

It is assumed that the propositions decided by the *Pollock* cases will be applied to the case at bar without reargument thereof.

C.

The Tax Imposed by the Corporation Tax Law is upon the Net Income of the Appellee.

THE FACT THAT THE TAX IS DENOMINATED "A SPECIAL EXCISE TAX WITH RESPECT TO THE CARRYING ON OR DOING BUSINESS" IS NOT CONTROLLING.

In the first clause of the eighth section of Article I of the Constitution, Congress is given power

"To lay and collect taxes, duties, imposts and excises" subject to the limitation that "all duties, imposts and excises shall be uniform throughout the United States." In view of the holding of the court that those taxes which are thus required to be "uniform throughout the United States" are indirect and need not be apportioned, and that there is no tax which is not subject either to the rule of apportionment or the rule of uniformity (*Pollock v. Farmers Loan & Trust Company,* 157 U. S. at p. 557) it was evidently thought necessary to characterize this tax as an "excise" to break the force of the argument that it was actually a tax on income of land and personal property and therefore a direct tax.

The Century Dictionary defines "excise" as

> "An inland tax or duty imposed on certain commodities of home production and consumption, as spirits, tobacco, etc., or on their manufacture and sale."

The Standard Dictionary as,

> "A charge levied upon commodities of domestic production; an internal revenue tax."

And "Words and Phrases" says:

> "An excise duty is an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities." (Citing *Pollock vs. Farmers Loan & Trust Co.,* 158 U. S. 601, *Patton v. Brady,* 184 U. S. 608.)

Bouvier's Law Dictionary adopts the definition of Blackstone, Comm. Vol. I, p. 318:

> "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon

the retail sale, which is the last stage before the consumption."

The foregoing definitions of "excise" by the authorities usually accepted as interpreters of the English language demonstrate that the term "excise" is wholly inapplicable to this tax. The Corporation Tax Law does not seek to impose a tax upon commodities or upon their manufacture and sale, or upon licenses to pursue a trade or to deal in certain commodities. It lays a tax upon corporations, joint-stock companies, associations, and insurance companies, regardless of what they produce or in what they deal and regardless, indeed, of whether they produce anything or deal in anything. We do not believe it possible, by the most elastic interpretation, to class the tax sought to be imposed upon the appellee, which does no business except to lease the real estate it holds, within any of the definitions of "excise" quoted.

We are thus brought face to face with the proposition that Congress, in a tax law, by the use of words wholly inapplicable to the subject matter of the tax, can classify a tax which would otherwise be direct as indirect and thus take the law in question out of the operation of a Constitutional provision.

If Congress by the use of phraseology itself conformable to the Constitution, but inappropriate to the object sought to be obtained, can give validity to a Statute which would otherwise be invalid, and accomplish an unconstitutional result, an easy method is provided to do away with all constitutional limitations and restrictions. An unapportioned tax on real estate might be sustained if referred to in the Act creating it as an "excise." A duty on exports might be saved by denominating it an "impost." Nor would such a mischievous principle necessarily stop with tax legislation. Congress might establish

a national religion if the act were designated one "to promote the progress of science and useful arts." Persons might be deprived of property without due process of law under a statute purporting to borrow money on the credit of the United States.

In *Henderson v. Mayor of New York et al.*, 92 *U. S.* 259, the legislature of New York attempted to make the steamship companies pay a tax on immigrants introduced by them, providing that steamship companies should give a bond of $300 for four years for each immigrant landed, conditioned that the immigrant would not become a charge, but that the owner or consignee might commute such bond and be released from giving it by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. This Court, through Mr. Justice Miller, deemed the alternative of giving the bond so arduous, that it would practically never be complied with and said (p 268):

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owner of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*."

The case of *Collins v. New Hampshire*, 171 U. S. 30, is another instance of an attempt to elude the Constitution by the use of ingenious language. The legislature of New Hampshire sought to prohibit the sale of oleomargarine

as a substitute for butter, unless the oleomargarine was of a pink color. This Court held the statute to be in contravention of the Section giving power to Congress "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

The late Mr. Justice Peckham, writing the opinion, said (p. 33):

> "This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. * * Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson v. Mayor of New York,* 92 U. S. 259; *Morgan's Steamship Co. v. Louisiana,* 118 U. S. 455, at 462."

In the case of *Brown v. Maryland,* 12 Wheat 419, Chief Justice Marshall, in holding that a state tax was upon imports and therefore unconstitutional, although nominally upon the occupation of an importer, said (p. 444):

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general,

as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

The words of Mr. Chief Justice Fuller in the prevailing opinion in the *Pollock* case, in which he rejected the theory that a tax on the rents and profits of real estate was any less a direct tax because denominated a tax on "income" appear to us to have equal application to our question, whether such a tax is any less a direct tax because styled a "special excise tax." He said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by reported decisions of this court."
>
> 157 U. S. at p. 581.

Without further citation of authority, it may fairly be said that this court, in determining whether a given enactment comes within a constitutional provision, has adopted the rule that it is the reasonable and natural effect of the act which determines its character rather than the language in which it is couched. There is, therefore, no magic in the use of the words "special excise tax with respect to the carrying on or doing business" which can transmute this tax from a tax on net income of property to an excise tax on doing business (whatever that may mean), if the natural and reasonable effect of the law is to tax net income, or which can remove the case from the operation of the principle laid down in the *Pollock* decision.

If the law in question had imposed a general income tax and then exempted individuals and co-partnerships could it be contended that the effect of such a law would be one whit different or that there was any real difference in the character of such laws?

Obviously the terminology employed is not controlling of the character of the law as a subject for judicial inquiry and this is especially so where, as has been shown, the description is wholly inappropriate.

THE TAX IS NO LESS AN INCOME TAX BECAUSE LAID ONLY UPON CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS AND INSURANCE COMPANIES.

If then, the character of the tax is not to be determined by the words employed to describe it but rather by the "natural and reasonable effect" of the statute, we have to inquire whether the "natural and reasonable effect" of the Corporation Tax Law is to tax anything else but net income.

The tax is stated to be imposed "with respect to the carrying on or doing business by such corporation, joint-stock company or association or insurance company." The following colloquy which took place in the Senate with reference to the paragraph of this bill is illuminative on this point:

> Mr. Borah: For the purpose of information, I should like to know the Senator's views as to what is taxed under this amendment—what is it that we lay this tax upon?
>
> Mr. Flint. The privilege of doing business.
>
> Mr. Borah. The privilege of doing business as a corporation or the privilege of doing business?
>
> Mr. Flint. The privilege of doing business.

Mr. Borah. As a corporation, or simply doing business?

Mr. Flint. Simply doing business.

Mr. Borah. That is all.

Cong. R. v44, p. 4033.

The suggestion is thus presented that the tax is not upon the net income but upon the "carrying on or doing business" and measured by the net income. The Corporation Tax Law was in this respect evidently patterned after section 27 of the act of 1898 imposing a tax upon sugar refiners and oil refiners and which was held constitutional by the court in the case of *Spreckels Sugar Rfg. Co. v. McClain,* 192 U. S. 397 as a tax upon the privilege of doing business.

It is important to note, however, that the Corporation Tax Law does not impose a tax upon the carrying on or doing any particular business, while, like the *Spreckels* case, the decisions which sustain taxes as indirect because upon the privilege of doing business all have reference to a particular business or occupation.

In *Pacific Insurance Co. v. Soule,*7 Wall,433, a tax upon the amounts insured, renewed and continued by insurance companies, on the gross amount of premiums received on dividends, undistributed sums and income was sustained and held not a direct tax. The operation of the Corporation Tax Law is not limited to insurance companies, nor, in the case of insurance companies is the tax limited to income from the insurance business.

In *Veazie Bank v. Fenno,* 8 Wall, 533, a tax upon the circulation of state banks was said not to be a direct tax though the court finally placed the power to lay the tax in question upon the "uniform currency" clause of the Constitution.

In each of the instances cited in which an unapportioned tax has been upheld as a tax upon the privilege of doing

business, the tax has been imposed upon the profits resulting from doing some particular kind of business. In the *Pacific Ins. Co.* case it was upon conducting the business of insurance, in the case of *Bank v. Fenno* it was upon the business of circulating notes, and in the *Spreckels* case, the duty was upon the business of refining sugar or refining petroleum. The Corporation Tax Law puts a tax upon corporations, joint-stock companies, and insurance companies, altogether irrespective of what business they are engaged in. It taxes the net income from all sources, from investments, from accumulated funds or surplus, as well as from the business to carry on which the body corporate was organized. The tax is not measured by the profits of the business but by the income from all sources. Having in mind the definition of "excise" as a tax "on certain commodities" or "on their manufacture and sale" or "upon licenses to pursue certain trades or deal in certain commodities" the line of demarcation between the cases cited and that at bar is very apparent.

Patton v. Brady, 184 U. S. 608, sustained a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, for consumption and sale, the court holding the tax was not direct because (p. 619) "it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use." This language is quoted in the *Spreckels* case in aid of the decision there reached with respect to the tax on the business of refining sugar. This shows distinctly that this court, in the *Spreckels* case, did not so enlarge the doctrine of prior decisions as to authorize an excise tax upon doing business generally but, following *Patton v. Brady,* regarded the tax as being strictly with respect to the commodity dealt in.

A TAX UPON DOING BUSINESS IS MEASURED NOT BY NET INCOME BUT BY GROSS RECEIPTS.

Mr. Justice Harlan, writing the opinion in the *Spreckels* case points out a clear line of distinction between that case and one such as this. He says (p. 411):

> "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing business of refining sugar. It cannot be otherwise regarded because of the fact that *the amount of the tax is measured by the amount of the gross annual receipts.*"
>
> (Italics are ours)

Mr. Justice Harlan had in mind, probably, the decision in the *Pollock* cases from which he was distinguishing the facts of the *Spreckels* case, and does he not here indicate a fair test whether the tax is an income tax or upon the privilege of doing business? It will be remembered that in the case which sustained a tax on the insurance business (*Pacific Ins. Co. v. Soule*) the tax was laid on premiums earned, not on net income or net receipts. And the tax on circulating notes taxed every note "used for circulation and paid out" regardless of what gain the bank might make from its issuance (*Veazie Bank v. Fenno*). In none of the instances where a tax on business has been sustained was the tax measured by net income. It is easy to see with regard to the sugar refining business, that if a tax is imposed upon participation in that business, it would be imposed upon gross receipts from the business more naturally than upon net income, which would depend to a great extent upon an economy of policy, the employment of labor saving devices, a close supervision and the precautions to guard against waste and would therefore be a far less accurate test of the extent to which the concern participated in the particular business. If the tax were imposed on business generally,

moreover, it would seem that the gross receipts would be a more correct measure of the participation in business of the corporation, joint stock company or insurance company. If the tax sought to be imposed herein were really upon "the carrying on or doing business" it would be measured not by net income but by gross receipts.

Gross receipts are a measure of the business done, which includes expenditures and the business of expending as well as the business of receiving. Net receipts or net income excludes as a subject of taxation both the business of expending and receiving, and is a measure only of the earning power of the capital invested applied to the business carried on.

The decision in *Nicol v. Ames*, 173 U. S., 509, will be discussed hereafter in its relation to another phase of this case. For the present, it is sufficient to point out that nothing is there decided which is in conflict with the argument here advanced. The Court found the tax there imposed was "in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." An inspection of the statute there upheld will show that its operation was very limited, for it taxed a particular business, to wit, the sale of products and merchandise, only when transacted in a particular way, by employment of the facilities of exchanges or boards of trade. That is quite different from taxing all the business of corporations and similar bodies subject to the Corporation Tax Law in whatever manner transacted.

THE TAX IS NOT UPON THE PRIVILEGE OF DOING BUSINESS AS A CORPORATION.

It may be contended that what was sought to be taxed herein, was the privilege or facility of doing business in a corporate capacity. Hereafter in this brief we shall discuss the constitutionality of the Corporation Tax Law in that aspect. But that, we consider, is not the correct view of this law for the following reasons:

(1) The tax is imposed on joint stock companies and associations, as well as corporations.

(2) That the tax was upon the privilege of doing business in a corporate capacity, was expressly disavowed by those responsible for the passage of the Corporation Tax Law at the time of its enactment. (See portion of Congressional Record quoted supra.)

(3) The tax is stated to be "with respect to the carrying on or doing business," and does not purport to be a tax on such an "opportunity or facility" as was found to be the subject matter of the tax in *Nicol v. Ames*, and of which the Court there said (p. 519):

> "It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself."

A corporation, as such, possesses no "opportunity or facility" for doing business not possessed by a private individual.

(4) Throughout the history of jurisprudence, a corporation has been regarded as an artificial person having substantially the same legal attributes as other persons and not as a mere facility for other persons to do business. *Dartmouth College v. Woodward*, 4 Wheat 518. *Re Gibbs Estate*, 157 Pa. St. 59.

Professor Rudolph Sohm in his Institutes of Roman Law, in describing the Roman corporation, from which our notion of a corporation is taken, says (pp. 104-6):

"It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts."

The principle that a corporation is a person or entity distinct from the persons incorporating has been given especial significance in the tax measures of the States which have uniformly assessed the real and personal property of a corporation to the corporation rather than the incorporators.

(5) If the tax were upon the privilege of doing business in a corporate capacity, it would more likely have been measured by the capital stock issued or the dividends paid, in conformity with the franchise taxes of the States, than by the net income.

If, then, the natural and reasonable effect of the provisions of the Corporation Tax Law is not to place a tax upon the carrying on or doing of any particular kind of business, nor yet to place a tax upon the carrying on or doing business in a corporate capacity, there remains to consider whether there is left any virtue in the suggestion that the tax is upon "simply doing business." It is apparent that the discussion is again reduced to a mere question of terminology. For if a tax on a limited number of persons measured by their net income may be sustained as a tax on doing business irrespective of the kind

or extent of business done or the capacity in which it is transacted, there is no reason why a tax on all persons measured by their net income should not be upheld as a tax on doing business. Such a doctrine would deny all validity to the *Pollock* dicisions. In such case, the general income tax of 1894 would have been valid in all respects if it had been stated to be laid on doing business.

A CONCLUSIVE REASON WHY THIS TAX IS NOT UPON THE PRIVILEGE OF DOING BUSINESS OR UPON "SIMPLY DOING BUSINESS" IS THAT THE TAX IS NOT LIMITED TO THE INCOME DERIVED FROM BUSINESS.

It has become well recognized in our law that corporations may make investments within their corporate powers, but outside of the ordinary transaction of their business and that in making such investments and in receiving income therefrom they are not in a legal sense doing business, any more than an individual would be deemed to be doing business under the same conditions.

Thus in *People ex rel Singer Mfg. Co. v. Wemple* 150 N. Y. 46, the Court of Appeals of New York held that a New Jersey coporation which was principally engaged in manufacturing, which had invested $900,000 of its surplus earnings in real estate in New York City and was receiving the rentals therefrom, was not with respect to such real estate carrying on business within the State and that such $900,000 was not liable to taxation as capital employed in doing business. The Court said per Bartlett, J., p. 49:

> "We are of opinon that the amount represented by the real estate was no portion of the capital stock employed within this state even if the $900,000 was

a part of the capital stock of the company; it was an independent investment, and was in no sense employed within this state in the transaction of the ordinary business of the relator. (*People ex rel. The Southern Cotton Oil Company v. Wemple,* 131 *N. Y.* 64.) If at any time the whole or any portion of this real estate should be used by the relator in carrying on its business in this state a different question would be presented, which need not now be considered."

Similarly in *Coal & Mining Co. v. Ladd,* 160 Missouri 435, the Supreme Court of Missouri held that a New York corporation chartered for the mining and sale of coal, which had ceased mining within the State and leased its lands for agricultural purposes, was not doing business within the State so as to require a certificate of authorization as a prerequisite to maintaining suit in the Courts of the State with respect to said lands. The Court said per Burgess, J., at p. 442:

"The fact that plaintiff has leased its lands to tenants for agricultural purposes since it ceased 'the mining and sale of coal and the manufacture of coke therefrom,' is not 'doing business as a corporation,' within the meaning of the act."

In *Gilchrist v. Helena eta. R. R. Co.,* 47 Fed. 593, it was held that a New York trust company which purchased bonds of a railroad company operating in Montana and took a mortgage to secure them was not doing business within the state of Montana and might sue to foreclose the mortgage without having first obtained a certificate authorizing it to do business.

These cases on the question whether a foreign corporation is doing business within a given state show very clearly that, just as an individual, a corporation may make investments and derive income therefrom without

engaging in business. Indeed it is quite possible that a corporation may derive a substantial income without doing any business whatsoever. In the report of the Missouri case it nowhere appears that the mining company was doing any mining outside of the State, and if it did none, there is a clear cut instance of a corporation doing no business and yet having a net income. It would appear to us that a corporation which did nothing but hold railroad bonds or similar securities and receive the interest thereon, or one which merely held patent rights and received the royalties would furnish an instance of such an "incorporated gentleman of leisure". It is doubtful if the appellee which does nothing but receive the rental from the land of improved real estate it has leased can properly be spoken of as "doing business."

There can be little doubt that such corporations are subject to taxation under the Corporation Tax Law, for the only test set up as determining the liabilities of a corporation is whether it has a net income over $5,000 and certainly a corporation must pay a tax on its net income irrespective of how much or how little is derived from doing business for the law expressly says that the tax is to be "equivalent to one per centum upon the entire net income over and above five thousand dollars *received by it from all sources* during such year." We have thus the anomalous condition of a tax imposed upon "simply doing business" measured by income which is not determined by the income derived from business and must be paid irrespective of whether the corporation is engaged in business or not.

It is submitted that the tax under discussion not being upon the carrying on or doing of any particular kind of business, nor yet upon the doing of business in any particular way, and not being imposed upon gross receipts as has been the invariable rule with business taxes, and

being imposed irrespective of the extent to which the corporation engages in business and falling upon net income from invested property, is not a tax on carrying on or doing business, but is an income tax.

THE NATURAL AND REASONABLE EFFECT OF THE CORPORATION TAX LAW IS TO TAX NET INCOME.

If the tax is not in fact upon business and its description as a "special excise tax with respect to the carrying on or doing business" cannot avail in the face of the fact to make the tax one upon business, it follows that the tax must be upon income. A tax measured by net income which was confined in its operation to bachelors or to persons between certain ages would undoubtedly be considered an income tax. Aside from the fact that the tax under discussion is limited to a certain class of persons it is dependent upon no other element than the amount of income enjoyed by them. Certainly the "natural and reasonable effect" of the Corporation Tax Law is to tax net income.

Henderson v. May of New York 92 U. S. 259.
Collins v. New Hampshire 171 U. S. 30
Brown v. Maryland 12 Wheaton 419
Pollock v. Farmers L. & T. Co. 157 U. S. 429.

The efforts of the framers of this law to take it out of the operation of the Pollock decisions have been fruitless. There can be no difference between a tax "of one per centum upon the net income" and a tax "equivalent to one per centum upon the net income". The language employed is an effort by a circumlocution to render of no effect a solemn adjudication of this Court. Here is simply an income tax imposed upon less than all the total number of inhabitants.

The tax being upon income which, in the case of the appellee, is derived wholly from real estate, it is with respect to the appellee, a direct tax and not being apportioned among the several states, unconstitutional and void.

POINT II.

If the Tax imposed upon the Appellee by the Corporation Tax Law is not upon Income, it is a Tax upon the Franchise to be a Corporation, and as such, void, because in conflict with the Implied Limitations upon the Taxing Power contained in the Constitution.

Under the preceding point we have maintained that the tax in question is invalid because a tax on the income derived from real and personal estate, and therefore a direct tax, which being unapportioned, must be held to be unconstitutional. If, however, it shall be the view of this Court that the tax is not upon net income, but is upon "the carrying on or doing business" in a corporate capacity, it is submitted that the tax must still be held to be unconstitutional, because such an interpretation would place the tax upon the corporate franchise, and the corporate franchise is exempt from taxation by reason of the implied limitations on the taxing power which are drawn from the dual character of the system of government recognized in the Constitution.

A.

If the Tax is not upon Net Income it is upon the Franchise to be a Corporation.

If the tax is not to be regarded as an income tax limited in its operation to corporations and similar

bodies, but is a tax upon some sort of privilege to do business, it is quite evident that the character of that privilege is to be determined by the element the presence or absence of which determines the liability to the tax. This feature with respect to the persons made subject to the Corporation Tax Law is the fact of the possession of a franchise to be a corporation or the right to do business as a joint stock company or association. In other words, a tax upon the privilege of carrying on or doing business by a corporation or a similar body can be nothing more nor less than a tax on the right or franchise to be a corporation or a similar body and to do business in a corporate capacity.

Considering the Corporation Tax Law as imposing a tax upon the corporate franchise, we contend that it is unconstitutional because in violation of the implied limitations in the Constitution upon the taxing power of the Federal Government.

It appears from the allegations of the bill (fol. 4) that the Appellee is a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and it further appears (fol. 6) that the operations of said Appellee have been conducted wholly within the State of New York. It must be observed that the tax sought to be imposed herein cannot be sustained under any theory predicated upon the powers conferred to regulate commerce with foreign nations, or among the several States, or with the Indian tribes, for the reason (fol. 6) that the Appellee is not engaged in any such commerce.

B.

The Federal Government and the Government of the States are, within their Respective Spheres of Action, Mutually Independent and,

because of such Independence, the Taxing Power of Each is Limited in that Neither may Tax the Agencies of the Other.

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

This amendment indicates the line of demarcation between the respective spheres of action of the National Government and the government of any state.

From the very first the idea has been entertained that the Federal and State Governments have different functions to perform and hence neither is subordinate to the other. Madison said in "The Federalist" (No. XLVI):

> "The Federal and State governments are in fact but different agents and trustees of the people constituted under different powers and designated for different purposes."

That the Federal and State Governments are independent of each other is a doctrine to which this Court has uniformly adhered. In *The Collector v. Day*, 11 Wallace, 113, Mr. Justice Nelson said (page 124):

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the States."

One of the cardinal principles which this Court has adopted in its interpretation of the Constitution is that

neither government should be allowed in any way to burden, impede or hamper the functions of the other. The adoption of this principle has been deemed necessary in order to avoid conflict or friction between the officers of the respective governments and to maintain that harmonious system which it was the desire of the framers of the Constitution to erect.

In former times, before the national idea had become as prominent as it is to-day, this Court was more frequently called upon to safeguard the powers of the National Government from encroachment by the States. *M'Culloch v. Maryland,* 4 Wheaton, 316, is the leading case among those decisions of this Court which upheld and maintained the prestige of the National Government and rejected the theory that the National Government was dependent for its very existence upon the grace of the individual States. In that case, it was held that Congress might incorporate the Bank of the United States and, when so incorporated, the Bank and its branches were exempt from taxation by the State of Maryland. In support of the principle of the independence of the Federal Government of the States there announced, Chief Justice Marshall said (page 430):

> "We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one govern-

ment to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

It is quite apparent from this language that the Chief Justice had in mind not only the freedom of the Government from State taxation but also the exemption of the agencies of the State from federal taxation, and that his decision involved the idea of mutual independence and thus indeed subsequent cases have interpreted the decision.

With regard to the effect of permitting the State to impose a tax such as the one then under discussion, Chief Justice Marshall had this to say (page 432):

> "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

THE STATES HAVE BEEN UNIFORMLY HELD WITHOUT POWER TO TAX THE INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT.

In *Osborne v. The Bank,* 9 Wheaton, 738, the principles laid down in *McCulloch v. Maryland* were reconsidered and emphatically endorsed. It was again held that a State was without power to tax the Bank of the United States—Chief Justice Marshall writing the opinion.

Similarly in *Weston v. Charleston,* 2 Peters, 449, it was held upon the authority of *M'Culloch v. Maryland,* that the stock of the United States was not subject to be assessed for taxation, and in *Dobbins v. Commissioners of Erie County,* 16 Peters, 435, the office of captain of a revenue cutter of the United States was held not liable to be assessed for taxes under the laws of Pennsylvania.

Again in *Bank of Commerce v. New York City,* 2 Black, 620, it was held upon the authority of *M'Culloch v. Maryland* that a statute of the State of New York laying a tax upon the capital of corporations was invalid with respect to the relator, in so far as it sought to tax that part of the capital represented by investments in stocks, bonds and securities of the United States. Substantially the same thing was held in the *Bank Tax Case,* 2 Wallace, 200.

Upon the same theory, certificates of indebtedness issued by the United States were held exempt from state taxation in *The Bank v. The Mayor,* 7 Wallace 16, and in *Bank v. The Supervisors,* 7 Wallace 26, United States notes issued under the Loan and Currency Act were held to be entitled to the same exemption and for the same reasons.

It thus appears that this Court has, by an uninterrupted line of decisions following *M'Culloch v. Maryland,* settled beyond the possibility of dispute at the present time, that the means and instrumentalities employed by the Federal Government in the exercise of its powers and functions are, because of the complete independence of that Gov-

ernment from the States, not subject to any exercise of sovereignty by the States, nor liable to be taxed by them, in whatever manner the tax is imposed.

THE DECISIONS WHICH, FOLLOWING *M'Culloch v. Maryland*, MAINTAINED THE EXEMPTION OF THE AGENCIES OF THE FEDERAL GOVERNMENT FROM TAXATION, WENT UPON THE PRINCIPLE THAT FEDERAL AND STATE GOVERNMENTS WERE INDEPENDENT OF EACH OTHER AND NOT UPON ANY SUPPOSED SUPREMACY OF THE FEDERAL GOVERNMENT.

Chief Justice Nelson, in *Bank of Commerce v. New York* (supra) after quoting the language of Chief Justice Marshall in the *M'Culloch* case, said (page 635):

> "All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of Government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

Chief Justice Chase writing the opinion in *Texas v. White*, 7 Wallace, 725, gives a very clear notion of the place and function of the States in our form of government and shows that this Court is committed to the principle here contended for. He says (page 725):

"But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, not prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in Union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but *it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.* The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states." (Italics are ours.)

THE SAME PRINCIPLE WHICH DENIES TO THE STATES THE RIGHT TO TAX THE AGENCIES OF THE FEDERAL GOVERNMENT EXEMPTS FROM FEDERAL TAXATION THE MEANS AND INSTRUMENTALITIES EMPLOYED BY THE STATES IN THE EXERCISE OF THEIR POWERS AND FUNCTIONS.

A great authority upon Constitutional Law says:

"If the States cannot tax the means by which the National Government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments."

Cooley on Constitutional Limitations, (7th Ed.) page 683.

This principle has become so well established by the adjudications of this Court that it is not open to question.

The Collector v. Day, 11 Wallace 113, decided, upon the authority of *M'Culloch v. Maryland* and the other cases cited above with respect to the implied limitations upon the taxing power of the States, that Congress could not include in a general income tax the salary of a judicial officer of the State of Massachusetts. Mr. Justice Nelson in the prevailing opinion, page 127, said:

> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempted from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and intrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at

the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The same result was reached in *United States v. Railroad Company,* 17 Wallace, 322, where the Court held that interest on bonds of the City of Baltimore, which had been issued for the purpose of a loan to the Baltimore and Ohio R. R. Co., was not taxable in the hands of the railroad company by virtue of a Statute authorizing the railroad to retain and turn over to the government five per cent of all interest paid by it.

In *Pollock v. Farmers' Loan and Trust Company,* 157 U. S., 429, it was held that the general income tax of 1894 so far as it was sought to lay a tax upon the income of municipal bonds was unconstitutional, Chief Justice Fuller saying (page 583):

"The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

The case of *Ambrosini v. United States,* 187 U. S., 1, decided that a person giving a bond as is required by the Laws of Illinois to obtain a liquor license was not obliged to place a revenue stamp thereon under the War Revenue Act of 1898, Chief Justice Fuller saying (page 7):

"The general principle is that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are

those of the States exempt from taxation by the general government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. Nelson, J. *The Collector v. Day,* 11 *Wall,* 113."

WHENEVER THIS QUESTION HAS COME BEFORE THE STATE TRIBUNALS THEY HAVE UNIFORMLY MAINTAINED THAT THE FEDERAL TAXING POWER DOES NOT EXTEND TO THE MEANS AND INSTRUMENTALITIES EMPLOYED BY THE STATES IN THE EXERCISE OF THEIR GOVERNMENTAL FUNCTIONS.

The Supreme court of Wisconsin has spoken several times upon this subject. In *Jones vs. Estate of Keep,* 19 Wis., 390, it was held that the fact that no revenue stamp had been affixed to the appeal papers as required by the Act of Congress of 1862 did not warrant a dismissal of the appeal, because Congress was without power to impose a tax upon the writs and processes of the State Courts, which view the Court deemed to be a logical result of *M'Culloch v. Maryland* (supra). The Court said, per Cole, J, page 394:

"The soundness of this general reasoning may be fully admitted, and still it does not establish the power of congress to impose a tax upon the writs and processes of state courts. The argument must be pushed still further, and it must be shown that Congress has not only an unlimited power to tax the property of the country and other subjects to which the power of taxation is applicable, but that it can directly tax the means employed by the states in the exercise of their governmental functions. Is there no limitation upon the power of taxation,

which all concede is vested in the general government, and may it be applied to all subjects within the discretion of Congress?"

And again, on page 395:

"From this it follows, that there must be some limit to the taxing power on the part of the states and that of the general government. Such limitations must necessarily exist, for an unlimited power to tax on the part of one, is incompatible with the existence of the other. For if an unlimited power of taxation on the part of Congress be established—if it may require a writ of a state court to be stamped—it may likewise say that an act of the state legislature, a commission or pardon issued by the governor, shall have no effect unless stamped. Congress may tax any and all the means employed by state governments in the execution of their powers. The assertion of such a power is hostile to the states and repugnant to the fundamental principles and maxims of our system of government."

Following this, the Court held, in *Swift vs. Cornes,* 20 Wis., 397, that Congress could not require a stamp to be affixed to a notice of appeal, and, upon the authority of *Jones vs. Estate of Keep,* the Court held, in *Sayles vs. Davis,* 22 Wis., 217, that a tax deed given under a sale of land for the non-payment of taxes was not required to be stamped, although included within the terms of the Federal Statute, the Court saying per Dixon, C. J., at page 221:

" 'The power to tax involves the power to destroy; and the power to destroy may defeat and render useless the power to create'. The functions of government exercised in the levying and collection of its taxes are more vitally important to its existence

and independence than any other. Without the free and unobstructed exercise of such power no state can exist, and all sovereignty and independence are at an end. We cannot but regard this as an obvious departure from the spirit and requirements of our federal constitution, and contrary to the intention of the convention which framed, and of the states which ratified it."

The Supreme Court of Michigan took the same view of the matter in *Fifeld vs. Close*, 15 Mich., 505, and held that the Act of Congress taxing the process of State Courts was unconstitutional, and refused to dismiss a case because no stamp was affixed to the summons. The Court said, pages 505-507:

> "The power of Congress to impose such a charge, as a condition upon litigation, is denied by the plaintiff in error as inconsistent with the control which the Constitution of the United States guarantees to the State authorities over all such matters as has been left by that instrument under local regulation. * * *
>
> "If Congress has the right to impose a duty or tax upon suits in courts of the states, it follows as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the states."

And again, on page 508:

> "The same supreme power which established the departments of the general government, determined that the local governments should also exist for their

own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the constitution which can be made to admit of any intereference by congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature as if the interference were direct and extreme.

We are not, therefore, at liberty to give weight either to the moderate amount of the tax, or to the solicitude manifested by Congress to exempt those cases more immediately concerning the state as a community." (Italics are ours.)

The Supreme Court of Judicature of Indiana, also in *State ex rel Lakey v. Garton*, 32 Ind. 1, decided that a Sheriff's official bond was not a subject for taxation by the Federal Government and was valid although unstamped. Mr. Justice Ray, writing the opinion, after citing *M'Culloch vs. Maryland*, (supra), said, page 7:

"The principle which operates as a limitation upon the power of the state to tax the agencies and minute machinery employed by the general government to carry out its constitutional functions, must in turn equally restrain the power of Congress to tax, to trammel, or destroy, the means used by the state to perpetuate an existence as sacred under the Constitution as the national life, because a constituent of that life."

It thus appears that by the decisions of this Court and also by the decisions of the highest courts in several

of the States, it has been definitely settled that as the State legislatures are without power to place a tax upon the instrumentalities employed by the Federal government in exercising its powers and functions, so Congress may not tax the instrumentalities employed by the State governments to perform their governmental functions.

THE DECISION IN *South Carolina vs. United States* 199 U. S. 437 IS NOT ADVERSE TO OUR CONTENTION.

The powers of the general government with respect to the taxation of the agencies of the States are clearly defined and as clearly limited by this case. It is there established that when a state, even in the exercise of its paramount police power, engages in private business, even of an exclusive nature, the salaried agents of the State in carrying on that business are subject to a license tax, uniform in its application to dealers in intoxicating liquors throughout the United States. This is by reason of the fact that the power of the Federal government to lay uniform excise taxes affects business carried on by the State, even though connected with the exercise of the police powers. The principle is recognized, however, that the taxing power of the Federal government does not extend to the instrumentality of the State necessary to enable it to discharge its governmental functions.

The court recognized fully the principles above referred to and said (p. 452):

> "In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of *M'Culloch v. Maryland,* 4 Wheat.

316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is similar and needs not to be quoted from. No answer has ever been made to the argument of Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn v. Bank of United States*, 9 *Wheat.* 738, *Weston v. City Council of Charleston*, 2 *Pet.* 449; *Bank of Commerce v. New York*, 2 *Black.* 620; *Bank Tax Case*, 2 *Wall.* 200; *The Banks v. The Mayor*, 7 *Wall.* 16.

The court considered the tax (p. 458) to be on "a business" and, of course, what was taxed was not the right of agents of the State to carry on business as such agents, but merely the occupation of selling liquors. The court based its decision upon the fact that, from the very beginning, the Federal Government was recognized as having a power to require liquor licenses and the assumption of the liquor business by the State could not be allowed to affect a source of revenue which had always been recognized as belonging to the Federal Government, for that would be an encroachment upon the Federal power. The case at most constitutes a limitation to the exemption of the instrumentalities of the State from taxation, to wit: That the State cannot by engaging in a line of business, ordinarily taxable, deprive the Federal Government of its accustomed revenue from that source.

This indeed is the view which this court has subsequently taken of that decision, for it said through Mr. Justice White in *Murray v. Wilson Distilling Co.*, 213 U. S. 151, at p. 173:

> "That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy the pre-exist-

ing right of taxation possessed by the government of the United States."

Inasmuch as the Federal Government has never taxed the corporate franchise, it cannot be said that, in setting up the exemption of the franchise to be a corporation from Federal taxation, we are limiting any recognized source of income to the government.

We have then to consider whether the corporate franchises granted by the several States, and which we are now assuming to be the objects of the Corporation Tax Law, are not to be considered as such instrumentalities of the State within the meaning and intent of the decisions just discussed.

C.

The Franchise to be a Corporation is a Means Employed by the State Government in the Exercise of its Powers and Functions.

It is unnecessary to point out that a corporation owes its existence to the State and that in giving birth to a corporation the State perfoms a sovereign function. Chief Justice Marshall said in *M'Culloch v. Maryland,* at page 410:

"The creation of a corporation it is said appertains to sovereignty. This is admitted."

Moreover, in contemplation of law, after a corporation is brought into existence it possesses some of the attributes of the sovereign State which created it. Blackstone defines a franchise as "a royal privilege or branch of the King's prerogative subsisting in the hands of a subject." This Court may take cognizance of the fact that corporate franchises granted by the several states have not merely the character of private property or of personal privileges conferred upon the corporators for their own advantage, but are created to carry out the

governmental purposes of the States respectively in regard to matters of which they have exclusive jurisdiction, involving among other things the ownership of property, the promotion of industry, the character of citizenhood and the development of natural resources.

By way of illustration, we allege that the laws of the State of New York in regard to the organization of corporations, are founded upon considerations of public policy, express the purposes of the State in its sovereign capacity, and are designed among other things,

(1) To encourage and make possible the accumulation of capital for large enterprises, including works of public utility which might not otherwise be undertaken by private capital;

(2) To make the ownership of property and interest therein and particularly of real property more readily divisible and transferable, thereby promoting the extension of such ownerships to a larger body of citizens;

(3) To secure more competent and efficient management of property and to facilitate the supervision of such management on the part of those acting in a representative capacity;

(4) To promote the utilization of new inventions and discoveries, the pursuit of new industries and the seeking of new markets, by distributing the risk involved in such enterprises and limiting the liability of those engaged therein;

(5) To inculcate the habit of co-operation among the citizens and to accustom them to act in an organized capacity, to perpetuate the good-will and trade names of manufacturing establishments and commercial houses;

(6) To avoid the halting of business and the locking up of capital by reason of death;

(7) To obtain information by means of periodical reports in regard to conditions affecting commerce and

industry and to enlarge the revenues of the State by means of taxes and fees imposed as a condition of granting such franchises.

(See allegations of Complainant's Bill, Folio 20 of Record.)

Clearly it would seem as if the corporation, clothed "with a branch of the King's prerogative", and sent out to secure the ends which the State has come to regard as desirable, must be regarded as a governmental instrumentality of the State. *Angell & Ames* in their work on corporations, 10th Edition, page 23, in commenting on the classification of corporations generally prevailing, say:

> "Private corporations are indisputably the creatures of public policy and in the popular meaning of the term may be called public".

And this Court said, in *Hale v. Henkel,* 201 U. S., 43, at p. 74:

> "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation."

The way in which the corporation is employed as an instrumentality of the government is perhaps best illustrated in the case of public service corporations such as railroads, water, gas, telegraph and telephone companies, which the State creates to perform certain of the functions which States often perform themselves, and in case of trust companies, which by virtue of their character as depositaries and their eligibility as trustees, guard-

ians, etc., prominently assist in the administration of justice. (See the following cases in which it is evident this court considered that supplying water to municipalities was a public function. *Walla Walla case,* 172 U. S. 1; *Los Angeles case,* 177 U. S. 558; *Freeport case,* 180 U. S. 587.) The way in which the governmental purposes of the State are subserved is also clearly shown in the case of realty companies such as the appellee, which, by reason of making real property more readily divisible and transferable, promote the extension of such ownership to a much larger body of citizens than could possibly own real estate under a system of individual ownership, and tend to break up accumulations of real estate in single hands.

It is the part of a government to foster and encourage among its citizens the conditions above enumerated. Such conditions cannot be effectually brought about, except by acts of the sovereign power. When the State creates a corporation for the purpose of producing one of the results enumerated, it calls into being by an act of sovereignty, an instrumentality created to subserve a governmental purpose. "The power to tax is the power to destroy." It has been well said that this statement is applicable only to a subject with respect to which the power to tax exists. While this is true, it is equally true that if the exercise of the power to tax by the Federal Government may lead to the destruction of an attribute of sovereignty of a State, in view of the dual nature of our union, and the indestructible character of such attributes, the power to tax with such destructive result cannot exist.

Mr. Justice White, in *Knowlton vs. Moore,* 178 U. S., 60, says:

> "In other words, the power to destroy which may be the consequence of taxation is a reason why the

right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

Our contention is, that the right to create corporate or similar bodies is an attribute of sovereignty of the States. That the taxation by the Federal Government of the corporate right to be a corporation, with the accompanying power to tax and destroy the sovereign right of the States to create corporations for governmental purposes and as governmental agencies. This contention does not deny the right of the Federal Government to tax the real and personal property of the corporations, as pat of the property of the country, and their businesses and occupations as part of those of the country, subject to rules of justice, equality and uniformity applicable thereto. It does deny the right of the Federal Government to classify corporations by themselves as doing business as such, for the purpose of taxation, exempting at the same time from the operation of the tax laid upon them, their direct competitors, co-partnerships, and individual citizens.

We consider it to be settled law, that the franchise to be a corporation is an instrumentality of government, by the decision of this court in California v. The Southern Pacific Railroad Company, 127 U. S. 1.

That was a case in which the State of California sought to assess part of the property of the Central Pacific Railroad Company, its franchise to be a corporation and other franchises which had been conferred upon it by Congress. The Court decided that the tax was invalid, Mr. Justice Bradley saying at page 40:

"But may it (the State of California) tax fran-

chises which are the grant of the United States? In our judgment it cannot."

* * * * * * * * *

"No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. * * *

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland,* 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. *To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty.* It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland,* 4 Wheat. 316; *Osborn v. The Bank of the United States,* 9 Wheat. 738; and *Brown v. Maryland,* 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Pacific Railroad,* 9 Wall. 579, and *Railroad Co.*

v. Penniston, 18 *Wall.* 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the Company and not upon its franchises or operations. 18 Wall, 35, 37.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."

The suggestion has been made that the reason a federal corporation is not subject to taxation by the States is that the sovereignty of the United States is of a higher quality than that possessed by the States, and that whereas the States may not assume to exercise jurisdiction over or levy taxes upon the agencies of the federal government, the federal government is without such limitations. It is obvious that there is nothing in the case of *California v. Southern Pacific Railroad Co.,* just cited, nor in any of the other decisions which we have referred to as applicable to this point, to sustain this view of the matter, but it is worth while to note that this theory was expressly repudiated by this court in the case of *Collector v. Day, supra,* where the court said at page 126:

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error in respect to the question before us cannot be maintained. The two governments are upon an equality * * *"

The true principle maintained by the decisions of this court is that both the federal power and the State power are restricted from trespassing upon the sovereignty of each other. It appears, furthermore, that the Supreme Court has adopted this principle as the true interpretation of the provisions of the Constitution, and has denied to the federal government the right to tax the States and their instrumentalities upon the same ground that it has denied to the States the right to levy taxes which would be a burden upon the federal government. It would seem logically to flow from this that a particular kind of agency employed by the federal government and held on that ground to be exempt from State taxation, would, when employed by the State government, be equally exempt from Federal taxation. *As this Court has authoritatively decided that the franchise to be a corporation conferred by Federal Laws is not a subject for taxation by the State legislatures, it follows that the corporate franchise, issuing from a State, is not to be taxed by Congress.*

THERE IS NOTHING IN THE CASE OF *Nicol v. Ames*, 173 *U. S.*, 509, WHICH CAN SERVE AS AN AUTHORITY FOR THE TAX SOUGHT TO BE IMPOSED ON THE APPELLEE HEREIN.

That tax, as has previously been stated, was said by the Court to be "upon the privilege, opportunity or facility offered at Boards of Trade or Exchanges for the transaction of business mentioned in the Act". As has been pointed out, the tax was on the particular manner of doing business, and, therefore, analogous in its character to a tax on doing a particular kind of business, which as we have seen has always been held to be a proper exercise of the taxing power. The case did not decide that a tax might be laid upon the franchise to be a corporation. The Court said at page 517:

"This particular Board is incorporated under an Act of the Legislature of Illinois, though its corporate character does not in our judgment form a material consideration in the inquiry."

The privilege there taxed although conformable to the laws of the State, rested entirely in mutual advantage to the members of the Exchange, and can in no sense be considered as flowing from the sovereignty of the State.

We desire to call the special attention of the Court to the applicability to the question under discussion of the decisions cited above, holding that a tax on the legal process of the States is unconstitutional. In *Fifield v. Close,* the Court, as has been seen, spoke of such a tax as "a condition upon litigation", and in *Jones v. Estate of Keep* it appears to have been contended by counsel that the tax there was imposed upon the privilege of engaging in litigation. It has been contended that a tax upon a corporate franchise is valid because in many cases the chief object to be subserved is the interest of the incorporators. From this point of view, we suppose it might be said that the ordinary civil law suit is of even less public importance than is the business and operations of the ordinary corporation, and yet we find the courts with one accord holding the process issued under the authority of the respective states is exempt from Federal taxation, and it would seem that in like manner the charter of a corporation issuing from the States should be exempt from taxation by the United States.

D

For this Court to Hold that the Corporate Franchise of the Appellee was not Exempt from Federal Taxation would Establish a Dangerous Precedent.

The reason which prompted the court in *M'Culloch v.*

Maryland and in the cases following, to maintain the exemption of the means and instrumentalities of the Federal and State governments respectively against the taxing power of each was not only the fear that the Federal government or State government might be hampered or burdened in the exercise of its functions, but also that, unless such exemption was recognized, the powers and functions of either government would be dependent for their very existence upon the other, as was strikingly said by Chief Justice Marshall at page 431 of the *M'Culloch* case.

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

The measure which is now under discussion may be the only attempt which is made to encumber the functions of State governments and subject them to Federal domination. It may also be only the first of a series of legislative enactments, which shall have as their object the complete centralization of government in the United States and the relegation of the states to mere political divisions shorn of sovereignty, or indeed of any of the attributes of statehood uniformly held to be guaranteed them by the Constitution under the Tenth Amendment. Such a result would not only be in conflict with the decisions of Chief Justice Marshall and the other jurists who have sat upon the bench of this Court, but would work out an annihilation of local self-government which could not but be regarded as wholly repugnant to the principles gen-

erally understood as lying at the foundation of our Constitution and system of government.

It is respectfully submitted that, in the view that the Corporation Tax Law seeks to impose a tax upon the right of the Appellee to carry on or do business in a corporate capacity, it is unconstitutional because it imposes a tax which is an encroachment upon the rights and powers of the respective States reserved to them by the Tenth Amendment.

POINT III.

The Corporation Tax Law, if the Tax Falls upon "Carrying on or doing Business", must fail for want of Equality and Uniformity, in the Tax thereby imposed.

The first cause of the Eighth Section of Article I. of the Constitution provides:

> "All duties, imposts and excises shall be uniform throughout the United States";

and in the Fifth Amendment, it is declared:

> "Nor shall any person * * be deprived of life, liberty or property, without due process of law."

Complainant's bill alleges violations by the Corporation Tax Law of both these clauses of the Constitution. (Folios 13 to 18 and Folio 25 sub. p. of Record.)

In discussing the constitutionality of the Corporation Tax Law under this head, we are not unmindful of those decisions of this Court (*Knowlton v. Moore, Patton v. Brady, McCray v. United States, Nicol v. Ames*, etc.) which have held that the uniformity mentioned in the first passage of the Constitution quoted, is a geographical uniformity and that a duty, impost or excise is not violative of that clause if it operates alike in all parts of the Union. Giving full weight to these deliverances of this

Court, there is nothing in them opposed to the view that a tax may be so oppressive in its terms and so unequal in its operation as not to be an exercise of the taxing power, but so confiscatory in its nature and operations as to constitute a deprivation of property without due process of law or indeed be violative of "the fundamental principles of equality and justice" upon which the Constitution and the exercise of the power of taxation by the United States rests. Indeed both in *Knowlton v. Moore* (178 U. S. at p. 109) and in *McCray v. U. S.* (195 U. S. at p. 62) this argument was entertained and evidently not thought unreasonable by the Court, though postponed in each instance for future consideration because inapposite to the case at bar.

In declaring an assessment for a public improvement unequal in its operation, and therefore unconstitutional, though no express command of the State Constitution was violated (*Agens v. Mayor*, 37 N. J. L. 415) Beasley, C. J. said (p. 421):

> "In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon a specified property, does not exist."

The Supreme Court of Pennsylvania said of taxation in *Washington Avenue*, 69 Pa. St. 352 at p. 363:

> "But nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in distrcts and by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and

cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

It is believed that the Corporation Tax Law presents such a case of an unjust and unequal tax as to merit the condemnation of this Court upon the grounds suggested.

The decisions of this Court and of the highest Courts of the States which have interpreted the Fourteenth Amendment to the Constitution of the United States and the various provisions of the State Constitution with respect to "equality" and "uniformity" have held that while the Legislature may adopt a classification for the purpose of taxation, the classification must be a reasonable one, and all of the objects coming within the same class must be taxed alike.

Kentucky R. R. Tax Cases, 115 U. S., 321.
Magoun v. Ill. Tr. & Sav. Bank, 170 U. S., 283.
Cook v. Marshall County, 196 U. S. 261.
Michigan Central R. R. v. Powers, 201 U. S., 24
Adams v. Kuykendall, 83 Miss., 571.
State v. Ide, 35 Wash. 576.

We contend that this rule so uniformly applied to stat taxation is applicable to Federal revenue laws, and fu nishes a measure or test of the inequalities of the Co poration Tax Law, the inequality and oppressiveness which are apparent

A.

The Corporation Tax Law is Unequal in its Operation, in that Taxes Corporations, Joint Stock Companies and Associations, and E empts Individuals and Co-Partnerships Carrying on the same Busin and Deriving Net Income from the same Sources as in the Case of su Bodies.

It is an essential to a just and equal tax, free from t element of arbitrary confiscation of property without d

process of law, that there shall be *equality of burden among direct competitors.* This statute is conspicuously free from observance of this indispensable requisite.

"Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation."

Stuart vs. Palmer, 74 N. Y. 189.

If the tax is not upon net income, nor yet upon the privilege of being a corporation and doing business in a corporate capacity, but is simply upon carrying on and doing business, the operation of the law is manifestly unequal in not taxing all who carry on and do business. The statute necessarily creates a class in imposing the tax upon the act of doing business, and all who do business are necessarily included within the class and if, of these, only corporations, joint-stock companies, associations and insurance companies are taxed, there is that arbitrary selection for taxation of some members of a class which has been uniformly condemned.

The bill specifically sets forth (fol. 14) the names of nine hotels which are owned by private individuals, all yielding a larger net income than that of the appellee and all in direct competition with the appellee. In view of the very keen competition in the hotel business in New York, the charge imposed by the Corporation Tax Law may at some future date, under the pressure of some improvement undertaken or loss sustained, be just enough to disrupt the business of the appellee. The soundness of the argument here advanced is not affected by the consideration, if true, that there is small likelihood of such a result under the present law. The sanction by this Court of a tax operating upon so unequal a principle, would open the way for more drastic legislation of a like character, which would render ineffective the constitutional guaranties of property.

A tax law plainly departing from the principle of equality would be obnoxious as contrary to equity and as practical confiscation, and would involve taxing property without due process of law.

In failing to tax co-partnerships and individuals in direct competition with corporations there is inequality and confiscation. We have here a case presented within the language used by Mr. Justice White in *Knowlton v. Moore*, 178 U. S., p. 109, when he said:

> "If a case should ever arise where an arbitrary and confiscatory exaction should arise bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles in the protection of the individual even though there be no express authority in the Constitution to do so."

This tax is as open to condemnation as that declared invalid by the Supreme Court of Washington, in *State v. Ide*, 35 Wash. 576. There a poll tax was laid upon all men over twenty-one and under fifty. The Court said, p. 587:

> "* * * The classification made in imposing this tax is based solely upon age and sex. It has no relation to the property of the persons to be taxed, or to their ability to pay. The persons selected to bear the burden are under no greater obligations to pay for keeping the streets in repair than others who are exempted from the payment of the tax. Does such classification, then, rest upon a reasonable difference between the persons taxed and others who are not taxed?"

Keeping in mind that the tax is now supposed to be upon the carrying on and doing business, there is even less reason for a distinction here than in the *Ide case.*

B.

The Exemptions made in the Corporation Tax Law are such as to Render the Operation of the Law very Unequal.

By the provisions of the law are specifically exempted labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and corporations and associations organized and operated exclusively for religious, charitable and educational purposes, no part of the net income of which last inures to the benefit of any private stockholder or individual. The bill alleges (fol. 16) that the income of the corporations so exempted often exceeds the income of the appellee. No good reason appears for the exemption of building and loan associations.

C.

The Provision of the Corporation Tax Law which Allows as a Deduction in Computing Net Income Interest on only so much of the Bonded and other Indebtednness as does not exceed the Paid-up Capital Stock, is Unconstitutional for Inequality.

In the cases previously cited, it was held that the classification for the purposes of taxation, which a legislature may make, must be reasonable. We urge that the proportion of indebtedness to capital stock constitutes no basis for reasonable classification. It is entirely without precedent and involves the taxation of corporations having an indebtedness in excess of their capital stock, at a higher rate than that which must be paid by corporations not so indebted. It is a fact of common

knowledge that many corporations are indebted to many times the amount of their capital stock, a fact which does not necessarily affect their solvency, nor has it ever been regarded as the basis for the imposition of a discriminating tax. It is, however, quite possible that the imposition of this tax upon a corporation so indebted, would lay such a burden upon the corporation that it would be compelled to go out of business, or, at least, to give up doing business in a corporate capacity. A tax which tends to the destruction of its business, or the compelling the corporation by a discriminating tax to give up its corporate franchise, is without doubt such deprivation of property of the corporation without due process of law as is prohibited by the Fifth Amendment of the Constitution.

In speaking of the taxing power Cooley, in his work on Constitutional Limitations (7th Ed. p. 695), says:

> "It will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

In the case of banks, banking institutions and trust companies, whose principal indebtedness is to depositors and generally exceeds their capital stock by several times, it is porvided that all interest paid by such banks, banking associations, or trust companies, on deposits, is to be allowed as a proper deduction. Without receding from our contention that a just tax would allow a deduc-

tion of interest upon the entire indebtedness, it is evident, that, as the law now stands, allowing a bank, banking association or trust company to make such a deduction, and not allowing another corporation, which may be indebted in excess of its capital stock, to make a similar deduction, is marked discriminaton and renders the operation of the law unjust and unequal.

From this brief consideration of the subject, it is apparent that the Corporation Tax Law is not uniform or equal in its operation and will work injustice with respect to the selection of subjects for taxation and also between those selected. It cannot be possible that the effect of the decisions with regard to geographical uniformity is that Congress may pass any tax measure which serves the political expediency of the moment, however unequal or unjust, if that injustice operates in like manner in every State. The recognized principle of equality of burden between direct competitors should be preserved with respect to Federal revenue acts.

It is submitted that if this court shall not determine the tax herein to be invalid as an unapportioned direct tax or as a tax upon the franchise to be a corporation, it must nevertheless be held to be unconstitutional because of the inherent lack of uniformity and equality.

POINT IV.

The Provisions of the Corporation Tax Law with Regard to the Making of Returns and Constituting Such Returns Public Records are Unconstitutional as Requiring an Unreasonable Search.

By the bill in this case it was sought, not alone to enjoin the payment of the taxes sought to be imposed upon the appellee, but also to restrain the appellee

from making the returns to the Collector of Internal Revenue of the net income of the corporation, provided for in the Third Paragraph of the Corporation Tax Law. By the Sixth Paragraph, the returns are to become public records, and in the Fifth and Eighth Paragraphs severe penalties are provided for failure to make return. It is apparent that the constitutionality of these provisions with respect to the return, may be discussed from two standpoints:

(1) The character of the information required to be included in the returns.

(2) The feature of opening the returns to public inspection.

We contend that in both of these respects the Corporation Tax Law is repugnant to the Fourth Amendment, which is:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

A.

The Fourth Amendment Applies to Corporations as Well as Natural Persons.

It is indeed quite patent that a corporation and its stockholders are quite as seriously damaged by any prying investigation into the affairs of the corporation as are private individuals. They do business upon the same footing and suffer as much from a disclosure of their affairs of private concern to their competitors, as do natural persons engaged in the same line of business. The

search of one's papers and affairs is the violation of a distinct property right, an invasion of what Lord CAMDEN referred to in *Entick v. Carrington,* (2 Wils 275) as "often the dearest property a man can have."

The decisions that an officer of a corporation may not refuse to testify because he might by his testimony incriminate the corporation, and which are often loosely referred to as holding that the Fifth Amendment is not applicable to corporations, do not affect the rights of the appepellee here.

In *Hale v. Henkel,* 201 U. S., 43, Mr. Justice BROWN in rendering the decision, made clear the position of the Court (p. 75):

> "Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company v Ellis,* 165 U. S., 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."

B.

Requiring a Corporation to Make a Return under Penalty for Failure to do so, Constitutes a Search within the Meaning of the Fourth Amendment.

It is unnecessary that there shall be a physical entry and search in order to constitute a violation of the Fourth Amendment. It has been held that compelling a person to produce evidence to which the Government has no right, is equally within this constitutional provision.

Boyd v. United States, 116 U. S., 616.

Hale v. Henkel, (supra).

In the former, a proceeding to forfeit goods alleged to have been fraudulently invoiced to avoid duties, a statute which authorized the Court to make an order directing the defendant to produce the invoices of the goods in question, in the alternative of having the allegations of the information take *pro confesso*, was declared to be unconstitutional. Speaking of the famous case of *Entick v. Carrington*, which upheld the immunity of English subjects from unwarranted search, Mr. Justice BRADLEY, delivering the opinion, said (p. 630):

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense —it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

And, again, after showing the applicability of the Fourth Amendment: (p. 635)

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing

in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it, sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

In *Hale v. Henkel,* a *subpoena duces tecum,* which called for the production of paper and records indiscriminately, upon the authority of the *Boyd Case* was said to be violative of the constitutional provisions.

In the light of these authorities, it is manifest that requiring a corporation under penalty to make a sworn statement disclosing its private affairs, is as much a search of its "house, papers and effects" as would be the invasion of its place of business by a detachment of military. Indeed, that such a report or return comes within the purview of the Fourth Amendment was expressly decided by the Supreme Court of Illinois in *City of Clinton v. Phillips,* 58 Ill. 102:

In that case, an ordinance of the City of Clinton prohibited the sale of intoxicating liquors, but permitted the sale by apothecaries for sacramental, chemical, mechanical or medical purposes, requiring the seller to furnish

to the city clerk within ten days after the expiration of each quarter a written statement, under oath, of all liquors sold during the quarter, mentioning therein the kind and quantity, when and to whom sold, and upon whose prescription or assurance, or pay a penalty of not less than fifty dollars nor more than two hundred dollars. The defendant was indicted for failing to make the return.

The Court dismissed the indictment and held that the return sought to be exacted from the defendant constituted an unreasonable search and that the ordinance was unconstitutional. Mr. Justice THORNTON said: (pp. 104-105)

> "The penalty annexed is not for the sale of spirituous liquors. This is expressly permitted to druggists, for sacramental, chemical, mechanical and medical purposes. It is merely for a failure to report, quarter-yearly, the kind and quantity sold for such purposes, when and to whom sold, and on whose prescription or assurance. This report must be verified by the affidavit of the druggist, and of every clerk and servant in his employ."
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> * * * * * *
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> "The section is suspicious in its spirit, and excessively stringent in its requirements. It permits the sale, and then imposes the most odious conditions. A mere venial omission is tortured into a grave offense, punishable with a heavy penalty. The private citizen, invested with no public office or employment, should not be subjected to such inquisition."
>
> "All men have a right to the secure enjoyment of property, and to be protected in their houses, papers, and possessions against unreasonable searches. This section is an invasion of the sanctity of private business, and ought not to be tolerated.

"There was no power to enact it, and the judgment must be affirmed."

C

The Character of the Information Sought to be Elicited by the Returns Required by the Corporation Tax Law is such as to make the Requiring of Such Returns an Unreasonable Search.

Previous internal revenue statutes which have provided for a return by the person subject to the tax as a means to its enforcement, and which are not to be regarded as unconstitutional under the *Pollock* decision, have, in the nature of the case, limited the information called for to the particular goods or operations taxed. The return required by the Statute upheld in *Spreckels Sugar Rfg. Co. v. McClain,* 192 U. S. 397, for example, set forth the amount of gross receipts taxed, that is gross receipts from the sugar business. Indeed where an excise is laid upon a particular business, considerable argument may be made for the proposition that engaging or continuing to engage in that line of business operates as a consent that the government shall have possession of all the information that might aid it in imposing the tax. This idea lay behind the decision of Erskine, D. J. (In re Meador, Fed. Case 9, 375) holding that the act of 1868 which authorized the supervisor of internal revenue to summon any person to produce books and to testify before him was constitutional. The court said p. 1299:

> "As the Meadors, subsequently to the passage of this act of July 20, 1868, applied for and obtained from the government a license or permit to deal in manufactured tobacco, snuff and cigars, I am inclined to be of the opinion that they are, by this their own voluntary act, precluded from assailing the constitutionality of this law, or otherwise controverting it."

No theory of consent to the exposure of its private affairs can be worked out in the case of a corporation chartered by a state, made subject to the tax under discussion. The corporation cannot avoid making the return by giving up a particular line of business. The scope of the information called for covers all of the sources of income a corporation may have. In order to avoid the payment of the tax, or the making of the return it must not only go out of business, but it must be dissolved and lose its corporate capacity.

By this law, the corporation is left no option but to make public all of its affairs of most private concern. The information to be supplied is most comprehensive in scope. Nothing of the corporation's business or affairs is left undisturbed by the government. The answer that the making of the return in the form prescribed is necessary to the imposition of the tax, if true, is not sufficient. It is even more important that the constitutional immunities of the citizen are preserved than that the government should get the revenue provided for.

D

The Provisions that the Returns shall be Public Records open to Inspection as such, Require an Unreasonable Search.

Conceding for the sake of argument that, for the purpose of enforcing the tax, a certain invasion of the corporation's papers and affairs is permissible, still there appears to be no good reason why the returns provided for by the act should be open to inspection by others than those charged with the duty of assessing the tax. No good reason is offered why the Corporation Tax Law should not have provided that, as the practice is with respect to returns required by other internal revenue statutes, the returns should be disclosed only to those who can

satisfy the Commissioner of Internal Revenue that they have a legal right to make the inspection.

Whatever the purpose of the so-called publicity feature, the effect will be to expose to the eye of competitors the most intimate of the corporation's concerns. When it is remembered that this tax is not imposed on private individuals and firms and hence they have not to make returns, it is evident that the appellee will be put to an extreme disadvantage with respect to the natural persons and firms who are its competitors. The publication of such items as total indebtedness, gross income, total expenditures and net income, furnish to the competitor a very definite idea of the margin of success a corporation enjoys. The return shows at a glance the resources of the corporation and the owner of a rival hotel may know just how far the appellee can or will compete with him in expenditures for improvements to attract customers and otherwise. The possession of such information about his rival by one of two competitors places him upon an entirely different footing.

It is respectfully submitted that both from the unrestricted character of the information sought to be elicited and from the provisions for exposure of that information to competitors and others, the Corporation Tax Law provides for an unreasonable search contrary to the Fourth Amendment and hence is invalid.

CONCLUSION.

The Corporation Tax Law, so far as it sought thereby to impose a tax upon the appellee, is invalid. The tax is upon the income of the property of the appellee and hence void because an unapportioned direct tax. If it is not an income tax, it is upon the right or franchise to be a corporation or similar body and do business in a corporate

capacity, which right or franchise being an instrumentality created by the State for governmental purposes, is exempt from taxation. At all events, the tax is unconstitutional because of its confiscatory nature and for want of that equality and uniformity essential in the exercise of the taxing power by a constitutional government, especially in that it taxes corporations and similar bodies only and fails to tax individuals and co-partnerships carrying on like businesses. Moreover the provisions for making of returns and constituting such returns public records require an unreasonable search within the prohibition of the Fourth Amendment.

The decree of the Circuit Court should be reversed and the cause remanded with directions to overrule the demurrer and enter a decree in in favor of the appellant.

Respectfully submitted,

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